

**IN THE EUROPEAN COURT OF HUMAN RIGHTS
(FIRST SECTION)**

Re: *Tuleya v Poland* (Application no. 21181/19)

**WRITTEN SUBMISSION ON BEHALF OF
THE THIRD PARTY INTERVENERS**

**Stichting Rechter voor Rechter
&
Professor Laurent Pech**

11 December 2020



I. Introduction

1. These submissions are made by *Rechters voor Rechters* (Judges for Judges Foundation) and Dr. Laurent Pech, Professor of European Law at Middlesex University London (together, “the Interveners”), pursuant to the leave to intervene jointly as a third party granted by the President of the First Section on 23 November 2020 in the case of *Tuleya v Poland* (application no. 21181/19) pursuant to Rule 44(3) of the Rules of Court.

2. The case of *Tuleya v Poland* concerns the multiple disciplinary proceedings initiated against the applicant, a Polish judge who is well-known among the judges and by the public at large for his defence of the rule of law in Poland.¹

3. This third party intervention is structured as follows: First, it will outline the most important and relevant findings made by the European Commission and the European Parliament in the context of what is commonly referred to as Poland’s rule of law crisis, since the European Commission activated its Rule of Law Framework in January 2016;² Second, a brief overview of the most important judgments and orders of the European Court of Justice (“the ECJ”) will be offered; Third, the standards governing the right to respect for the private life of judges, in a context where this right has been systematically violated via state-sponsored or organised smear campaigns, including via a secret “troll farm”³ hosted within the Polish Ministry of Justice, will be briefly outlined; Fourth and finally, the standards governing freedom of expression, in a context where the integrity and independence of the judiciary is threatened and judges subject to an unprecedented volume of disciplinary investigations, proceedings⁴ and/or unprecedented sanctions,⁵ will be very briefly mentioned.

4. Five main submissions are made: First, the existence of systemic and generalised deficiencies as regards the rule of law, including the unlawful nature of the multiple legislative changes made by Polish authorities in particular as regards the disciplinary regime of judges, has been well established by both the European Commission and the European Parliament but also by the ECJ and national courts (most recently by the *Rechtbank Amsterdam*⁶); Second, there is now a well-established pattern whereby Polish authorities, including the courts they have captured such as the “constitutional tribunal” or the new bodies they have created such as

¹ See e.g. J. Berendt, “In Poland, a Stubborn Defender of Judicial Independence”, *The New York Times*, 10 January 2020.

² For further analysis and references, see L. Pech and K.L. Scheppele, “Illiberalism Within: Rule of Law Backsliding in the EU” (2017) 19 *CYELS* 3. For a five-year assessment of Poland’s rule of law crisis and the international responses in relation to this, see Poland’s Civil Development Forum (M. Tatała, E. Rutynowka and P. Wachowiec), Rule of Law in Poland 2020: A Diagnosis of the Deterioration of the Rule of Law from a Comparative Perspective, August 2020 and International and European Responses to the Crisis, November 2020.

³ PACE, The functioning of democratic institutions in Poland, report, Doc. 15025, 6 January 2020, para. 105.

⁴ See e.g. *ibid.*, fn 96 (“There are approximately 11.00 judges in Poland, 1174 disciplinary cases opened means approximately 10% of them are under disciplinary investigations which seems very, if not excessively, high”). Most recently, it was reported that the disciplinary commissioners want to prosecute 1,200 Polish judges for signing an open letter to the OSCE. See Judge “Safjan on disciplinary proceedings against judges in Poland”, *Rule of Law in Poland*, 4 September 2020 and for a recent comprehensive overview, see report of Judge Mazur for THEMIS, From bad to worse. Polish judiciary in the shadow of the ‘muzzle act’, 20 November 2020.

⁵ See e.g. *Rechters voor Rechters*, “Suspension and Salary Reduction for Critical Polish Judge Juszczyzyn”, 4 February 2020; *Rechters voor Rechters*, “Statement on Beata Morawiec”, 13 October 2020 (Judge Morawiec was inter alia sanctioned with a 50% salary cut by the disciplinary chamber notwithstanding the fact that the activities of this body as regards judges was suspended by the ECJ on 8 April 2020 in Case C-791/19 R).

⁶ ECLI:NL:RBAMS:2020:3776. See also ECJ pending Case C-354/20 PPU.

the so-called “disciplinary chamber”, deliberately ignore national but also EU orders and rulings they do not approve of, while the new disciplinary regime for judges is simultaneously used as a system of political control of the content of judicial decisions and a tool of intimidation; Third, the privacy rights of the Polish judges who have publicly criticised the authorities’ alleged “judicial reforms” have been deliberately and systemically violated, in particular via the criminal leaking of judges’ personal information and files, without Polish authorities taking any active step to remedy the situation or sanction those who have initiated and/or participated to these leaks; Fourth, European and international standards when it comes to freedom of expression of judges not only protect their right to speak up but also imply a duty to speak up to defend judicial independence in a situation where their country is experiencing a systemic threat to the rule of law as evidenced by the activation of exceptional monitoring mechanisms by both the EU and the Council of Europe; Finally, due to the systemic and generalised deficiencies regarding the independence of the Polish judiciary identified by EU and Council of Europe bodies as well as the ECJ and a number of national courts, it is submitted that the right to an effective remedy before an independent tribunal must be considered as being no longer guaranteed for any judge targeted by current Polish authorities, due to multiple legislative changes enabling the executive to interfere at will throughout the entire structure and output of Poland’s justice system as well as the ability to punish any judge at will on account of their political views and/or content of their judicial decisions.

II. Key findings made by the European Commission and/or the European Parliament in relation to the multiple legislative changes made by Polish authorities⁷

5. This Section will summarise the findings made by the European Commission and/or the European Parliament in relation to the following issues: (i) Lack of effective constitutional review of legislation; (ii) Changes made to the retirement regime of the Supreme Court judges, including the First President; (iii) Changes made to the structure of the Supreme Court; (iv) The introduction of a new so-called extraordinary appeal; (v) Changes made to the disciplinary regime; (vi) Changes made to retirement regime of current ordinary court judges and the arbitrary dismissal of ordinary court presidents; (vii) Changes made in relation to the NCJ.

(i) Lack of effective constitutional review

6. As noted by the European Commission,⁸ following the persistent violation of a number of rulings of the Polish Constitutional Tribunal issued in December 2015 and March, August and November 2016, Polish authorities were able to take control of the Constitutional Tribunal (“the CT”) in December 2016 via the appointment by the Polish President – **in flagrant violation of the Polish Constitution** – of an acting President of the CT (a position which **did not legally exist**) when the former president retired. Within twenty-four hours of her unlawful appointment, the acting President of the CT admitted three judges which were nominated by

⁷ This Section reproduces, for the most part, the first two sections of the TPI submitted by the present Interveners in the Case of *Żurek v Poland* (application no. 39650/18) and submitted to your Court on 26 October 2020.

⁸ See Commission Recommendation of 20 December 2017 regarding the rule of law in Poland, C(2017) 9050 final, complementary to Commission Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520; Reasoned proposal in accordance with Article 7(1) of the Treaty on European Union regarding the rule of law in Poland. Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, COM(2017) 835 final, 2017/0360 (APP); Commission contribution to the Council on the rule of law in Poland/Article 7(1) TEU Reasoned Proposal. Hearing of Poland, 11 December 2018, Council document 15197/18.

the Polish parliament **without a valid legal basis**. Twenty-four hours later, the acting President was then made President following a vote which only saw the **three unlawfully appointed judges** and three judges appointed by the current governing majority casting their votes out of the 14 judges present at the meeting.

7. For the European Commission as well as the European Parliament,⁹ the unlawful appointment of the current president of the CT and the unlawful composition of the CT mean inter alia that the constitutionality of Polish laws has not been effectively guaranteed since December 2016. In addition, the “judgments” rendered by the unlawfully presided and composed CT under these circumstances **can no longer be considered as providing effective constitutional review**. In this respect, it is worth stressing that the largest association of Polish judges no longer recognises as legitimate the currently unlawfully composed CT and called on independent judges to assess whether its “rulings” may be considered “valid and final” when they are issued by panels which include unlawfully appointed individuals.¹⁰ In a recent instance where a court held a “ruling” of the CT null and void,¹¹ Polish authorities responded with a request for case files.¹² Such action usually results in disciplinary investigation prior to the eventual adoption of disciplinary sanctions and initiation of criminal charges against the judge who issued the relevant judgment.

(ii) Changes made to the retirement regime of the Supreme Court judges

8. In its fourth Recommendation of 20 December 2017, the European Commission recommended that the Polish authorities ensure that the law on the Supreme Court is amended so as (i) not to apply a lowered retirement age to the current Supreme Court judges¹³ and (ii) to remove the discretionary power of the Polish President to prolong the active judicial mandate of the Supreme Court judges. This law also targeted the **First President of the Supreme Court** raising to the fore the issue of a flagrant violation of the Polish Constitution as the First President’s mandate of a 6-year term of office **was due to be prematurely terminated notwithstanding the fact that the Polish Constitution sets the period of that term of office**.

9. According to the European Commission, the new retirement regime adopted by Polish authorities undermined the principle of judicial independence, including the principle of irremovability of judges. The Court of Justice confirmed the accuracy of the Commission’s legal assessment in Case C-619/18 in which the **Court held that the Polish legislation concerning the lowering of the retirement age of judges of the Supreme Court is contrary to EU law**.

⁹ See [European Parliament resolution of 17 September 2020 on the proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law](#), PA_TA-PROV(2020)0225.

¹⁰ [Position of the Polish Judges Association IUSTITIA over the status of the Constitutional Tribunal](#), 30 October 2020. See also [Position of the Management Board of the Polish Society of Constitutional Law](#), 28 October 2020.

¹¹ P. Szymaniak, “[Wyrok TK uznany za niebyły](#)”, *Gazeta Prawna*, 3 November 2020.

¹² P. Szymaniak, “[Sąd uznał wyrok TK za niebyły. Teraz prokurator żąda wydania akt w sprawie o wykroczenie](#)”, *Gazeta Prawna*, 5 November 2020.

¹³ Pursuant to the law on the Supreme Court, the Supreme Court judges who attained 65 years of age by 3 July 2018, were asked to declare their intention to remain in the Supreme Court by 4 May 2018. 27 current judges of the Supreme Court judges were affected by the retroactive and subsequently held unlawful lowering of the retirement age.

(iii) Changes made to the structure of the Supreme Court

10. In March 2018, the Polish President of the Republic increased the total number of posts in the Supreme Court from 93 to 120. Many the new individuals appointed by the Polish President have been appointed to the new Disciplinary Chamber (“DC”) and the new Extraordinary Control and Public Affairs Chamber (“ECPAC”). In agreement with the Venice Commission,¹⁴ the **European Commission questioned the independence, or rather lack thereof, of these two new chambers.** Three independent chambers of Poland’s Supreme Court have since **authoritatively stablished the flagrantly unconstitutional nature of the DC as well as its lack of compliance with EU Law.**¹⁵ Most recently, the European Parliament reiterated that the DC cannot be considered a court and called for the Commission to urgently start infringement proceedings in relations to the ECPAC “since its composition suffers from the same flaws” as the DC.¹⁶

11. The arguably unlawful nature of the appointment procedure followed by the Polish President is also a matter of ongoing litigation before the ECJ. Among other factors which make these appointments arguably unlawful, one may mention that the individuals appointed to the DC and the ECPAC have been appointed on the back of a procedure which lacks legal basis as the President did not obtain the Prime Minister’s countersignature when he published vacant seats in the Supreme Court. Furthermore, **many of the same individuals were appointed in violation of a freezing order issued by Poland’s Supreme Administrative Court.** These aspects were formally denounced by Poland’s Supreme Court on 23 January 2020 in a binding resolution never complied with by Polish authorities and which detailed the flagrant, deliberate and manifold procedural irregularities committed by these authorities.¹⁷ Unsurprisingly, the unlawfully composed CT (see point (i) above) unlawfully **annulled the resolution regardless of its obvious lack of jurisdiction and violated EU law when it did so.**¹⁸

(iv) Extraordinary appeal procedure

12. The European Commission has repeatedly recommended that the Polish authorities ensure that the law on the Supreme Court is amended to remove the extraordinary appeal procedure. Due to the cosmetic nature of the amendments made in May 2018, the European Commission has remained of the view that **this procedure is not compatible with the rule of law** due in particular to the “broadness of the criteria governing the extraordinary appeal”, the “20-year reach of the extraordinary appeal” and the fact that this procedure “could even justify, for

¹⁴ According to the Council of Europe’s Venice Commission, some aspects of the Polish judicial “reforms” targeting its Supreme Court ‘have a striking resemblance with the institutions which existed in the Soviet Union and its satellites’: See Opinion 904/2017, para 89.

¹⁵ For references and further analysis, see L. Pech, *Dealing with ‘fake judges’ under EU Law: Poland as a Case Study in light of the Court of Justice’s ruling of 26 March 2020 in Simpson and HG*, RECONNECT Working Paper no. 8, May 2020.

¹⁶ European Parliament resolution of 17 September 2020, op. cit., para. 23.

¹⁷ For extensive references and further analysis, see L. Pech, *Dealing with ‘fake judges’ under EU Law*, op. cit.

¹⁸ European Parliament resolution of 17 September 2020, op. cit., para. 22 (The CT “declared the Supreme Court resolution unconstitutional on 20 April 2020, creating a dangerous judiciary duality in Poland in open violation of the primacy of Union law and in particular of Article 19(1) TEU”).

example, the repeal of final judgments by Polish courts applying EU law as interpreted by the case-law of the Court of Justice of the EU.”¹⁹

13. It is important to recall that the composition and manner of appointment of the individuals appointed to the chamber in charge of hearing these “extraordinary appeals” has been widely denounced, with the Parliamentary Assembly of the Council of Europe questioning for instance earlier this year “their independence and their vulnerability to politicisation and abuse” and demanding from Polish authorities that these issues are addressed as a matter of urgency.²⁰

(v) Changes made to the disciplinary regime

14. In its fourth Recommendation of December 2017, the Commission raised a number of concerns in particular related to the autonomy of the new DC, the removal of a set of procedural guarantees in disciplinary proceedings conducted against ordinary judges and Supreme Court judges and the influence of the Polish President and the Minister of Justice on the disciplinary officers. On 3 April 2019, the Commission launched an infringement action regarding the new disciplinary regime for judges on the main ground that it undermines the judicial independence of Polish judges by not offering necessary guarantees to protect them from political control. This action is now pending before the ECJ (Case C-791/19). Following the adoption of what is informally known as Poland’s ‘muzzle law’, a new infringement action was launched on 29 April 2020.²¹ For the Commission, the new law broadens the notion of disciplinary offence and thereby **increases the number of cases in which the content of judicial decisions can be qualified as a disciplinary offence. As a result, the disciplinary regime can and has been used as a system of political control of the content of judicial decisions.**

15. Most recently, the European Parliament denounced “the new provisions introducing further disciplinary offences and sanctions in respect of judges and court presidents because they pose a serious risk to judicial independence” stressing *inter alia* its **deep concerns in relation to “the disciplinary proceedings initiated against judges and prosecutors in Poland in connection with their judicial decisions applying Union law or public statements in defence of judicial independence and the rule of law in Poland.”**²²

(vi) Changes made to retirement regime of current ordinary court judges and the arbitrary dismissal of ordinary court presidents

16. In its fourth Recommendation of December 2017, the Commission recommended that the law on Ordinary Courts Organisation be amended to (i) remove the new retirement regime for judges of ordinary courts, including the discretionary power of the MoJ to prolong their mandate and (ii) address the situation of the ordinary court judges who have already been forced to retire because they were affected by the lowered retirement age. On 5 November 2019, in Case C-192/18, the ECJ upheld the action brought by the Commission and held that Poland had failed to fulfil its obligations under EU law, first, by establishing a different

¹⁹ Commission contribution to the Council on the rule of law in Poland/Article 7(1) TEU Reasoned Proposal. Hearing of Poland, 11 December 2018, op. cit., 13-14.

²⁰ PACE, The functioning of democratic institutions in Poland, Resolution 2316(2020), para. 7.4.

²¹ European Commission, Rule of Law: European Commission launches infringement procedure to safeguard the independence of judges in Poland, IP/20/772, 29 April 2020.

²² European Parliament resolution of 17 September 2020, op. cit., paras 31 and 32.

retirement age for men and women who were judges or public prosecutors and, second, by lowering the retirement age of judges of the ordinary courts while conferring on the Minister for Justice the power to extend the period of active service of those judges.

17. In its fourth Recommendation of December 2017, the Commission also recommended that the law on Ordinary Courts Organisation is amended to remedy decisions on dismissal of court presidents which took place under a six-month transitional regime and which saw over 70 presidents and 70 vice-presidents of courts lost their posts.²³ This transitional regime **gave the Minister for Justice the power to dismiss without any specific criteria, without justification and without judicial review any president and vice president of any ordinary court. No remedy has ever been provided for the judges who have been dismissed under this regime.**

(vii) Changes made to the NCJ

18. In its fourth Recommendation of December 2017, the Commission recommended that the Polish authorities ensure that the law on the NCJ is amended so that the mandates of its judges-members are not terminated and that the new appointment regime is removed to ensure election of judges-members by their peers, instead of by the legislative power. Polish authorities ignored the Commission's concerns and violated the Commission's fourth Recommendation when 15 new judges-members were elected on 6 March 2018 by the lower house of the Polish parliament **according to the new and unconstitutional regime (judges-members are no longer elected by judges), following the premature termination of the four-year mandates of the previous 15 judges-members, established in the constitution.**

19. This is also the assessment of the European Parliament which recently recalled that while "it is up to the Member States to establish a council for the judiciary, but that, where such council is established, its independence must be guaranteed in line with European standards and the Member State's constitution."²⁴ The Parliament furthermore called for the Commission to request the ECJ to suspend the activities of the new NCJ by way of interim measures.

20. The assessment of the ENCJ must finally be outlined. **Having suspended the new Polish NCJ on 17 September 2018, the ENCJ is now finalising its expulsion** due inter alia to the fact that "the KRS is in blatant violation of the ENCJ rule to safeguard the independence of the Judiciary, to defend the Judiciary, as well as individual judges"²⁵.

III. Key ECJ judgments and order regarding Poland's legislative changes targeting the Polish judiciary, judges and prosecutors

21. In addition to the two ECJ judgments in Case C-192/18 and Case C-619/18 finding Poland to have adopted and implemented legislative changes violating the principles of judicial independence and of the irremovability of judges, the ECJ issued a seminal judgment in Joined Cases C-585/18, C-624/18 and C-625/18, *AK*, in which it held that the Polish referring court (i.e., Labour and Social Insurance Chamber of Supreme Court) must ascertain whether

²³ See Commission contribution to the Council on the rule of law in Poland/Article 7(1) TEU Reasoned Proposal. Hearing of Poland, 11 December 2018, Council document 15197/18.

²⁴ European Parliament resolution of 17 September 2020, op. cit., para. 24.

²⁵ Position Paper of the board of the ENCJ on the membership of the KRS (expulsion), 27 May 2020.

the new DC is independent in order to determine whether that chamber has jurisdiction to rule on cases where judges of the Supreme Court have been retired, or in order to determine whether such cases must be examined by another court which meets the requirement that courts must be independent. **Applying the AK judgment, several chambers of Poland's Supreme Court found the DC to be a body established in breach of both Polish and EU law in several judgments adopted on 5 December 2019 and 15 January 2020, and in a resolution adopted on 23 January 2020.** On 8 April 2020, in Case C-791/19 R, the ECJ furthermore ordered the immediate suspension of the application of the national provisions on the powers of the DC with regard to disciplinary cases concerning judges.

22. To prevent compliance with EU rule of law requirements, including their application by national judges, Polish authorities have in the meantime adopted the “muzzle law” which is currently, as previously noted, the subject of an ongoing infringement procedure. On 30 October 2020, the Commission adopted its reasoned opinion and a referral to the ECJ can be expected by Spring 2021.²⁶ **This “muzzle law”, as observed by the European Commission but also the Venice Commission, has “legalised” the violation of EU rule of law requirements and provided for sanctions against any judge who would attempt, in particular, to apply the ECJ judgment in AK.**²⁷ This AK judgment was furthermore, and in any event, unlawfully voided by the DC on 23 September 2020, notwithstanding the fact that the ECJ ordered it to suspend its functioning as regards disciplinary cases and the flagrant lack of authority of the DC to void any ECJ judgment.²⁸

23. On 3 December 2020, due to the continuing functioning of the DC, the European Commission sent an additional letter of formal notice to Poland, which is a new grievance added to the pending action regarding Poland's “muzzle law”. According to the Commission, Poland continues to violate EU law by allowing the DC, the independence and impartiality of which is not guaranteed, “to decide on further matters which directly affect judges ... By giving the Disciplinary Chamber powers that directly affect the status of judges and the exercise of their judicial activities, **the Polish legislation jeopardises the ability of the respective courts to provide an effective remedy** (our emphasis), as required by the second subparagraph of Article 19(1) TEU, read together with Article 47 of the Charter.”²⁹

24. Finally, one must mention the recent Opinion of EU Advocate General Bobek of 23 September 2020 in relation to a specific prosecution section established by Romanian authorities with exclusive jurisdiction for offences committed by members of the judiciary. For AG Bobek, EU law precludes the establishment of a specific prosecution section with exclusive jurisdiction for offences committed by members of the judiciary, if the creation of such a section is not justified by genuine and sufficiently weighty reasons and if it is not accompanied by sufficient guarantees to dispel any risk of political influence on its functioning and composition.³⁰ We submit that for these very reasons, not only the special unit established in

²⁶ European Commission, Rule of Law: European Commission takes next step in infringement procedure to safeguard the independence of judges in Poland, October infringements package: key decisions, 30 October 2020.

²⁷ Joint urgent opinion on amendments to the law of the common courts, the law on the supreme court and some other laws, Opinion no. 977/2019, 16 January 2020, para. 31.

²⁸ II DO 52/20. English translation of this (unlawful) decision is available at <<https://ruleoflaw.pl/wp-content/uploads/2020/10/Case-II-DO-52-20.pdf>>

²⁹ European Commission, Rule of Law: Commission follows up on infringement procedure to protect judicial independence of Polish judges, December infringements package: key decisions, 3 December 2020.

³⁰ Opinion of 23 September 2020 in pending Case C-83/19, para. 291 et seq.

2016 within the national prosecutor's office tasked with investigating judges and prosecutors,³¹ but also the organisation and functioning of the team of disciplinary commissioners under Poland's new disciplinary regime for judges similarly violate EU law.³²

25. Considering the systemic undermining of judicial independence and the individual measures targeting Polish judges since the activation of the Commission's rule of law framework in 2016, their cumulative as well as their chilling effect, it is submitted that no Polish judge, as a defendant in disciplinary but more generally proceedings of any nature, has at his/her disposal any effective domestic remedy in any situation.

IV. European and international standards governing judges' right to respect for private life in a context where this right has been systematically violated via state-sponsored smear campaigns

26. The specific context existing in Poland must first be outlined. The **European Parliament has formally denounced "the smear campaign against Polish judges and the involvement of public officials therein."**³³ One particularly disturbing aspect of the smear campaigns against Polish judges, which have been ongoing for years,³⁴ was the secret establishment of a "troll farm" within the Ministry of Justice.³⁵ For the **Parliamentary Assembly of the Council of Europe**, the existence of "a politically motivated smear campaign ... 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, is both deplorable and concerning".³⁶

27. In addition to the pattern of sustained and unlawful leaking of critical judges' private information and/or disciplinary files to pro-governmental media and anonymous Twitter account(s),³⁷ which manifestly amounts to a "gross violation of privacy regulations"³⁸ and continues to this day,³⁹ State TV has been used to attack specific judges.⁴⁰ State resources have

³¹ See <https://pk.gov.pl/prokuratura/struktura-organizacyjna/wydzial-spraw-wewnetrznych/wydzial-spraw-wewnetrznych/> and E. Ivanova, "Wydział spraw wewnętrznych - speckomórka do zastraszania niepokornych sędziów i prokuratorów" ("Internal Affairs Department – special cell for intimidating rebellious judges and prosecutors"), *Wyborcza.pl*, 8 June 2020.

³² For a recent overview of the activities and costs of the activities of the chief disciplinary commissioner and his two deputies as well as the growing resources allocated to them, see M. Jalszewski, "Half a million for prosecuting defiant judges. The Law and Justice authority is throwing money at Ziobro's disciplinary commissioners", *Rule of Law in Poland*, 16 November 2020.

³³ European Parliament resolution of 17 September 2020, op. cit., para. 32.

³⁴ For examples from 2017, see e.g. A. Sanders, and L. von Danwitz, Luc, *Defamation of Justice – Propositions on how to evaluate public attacks against the Judiciary*, *VerfBlog*, 31 October 2017.

³⁵ PACE, *The functioning of democratic institutions in Poland*, report, op. cit., paras. 105-106 (Polish authorities have failed to establish an independent public inquiry into these smears campaigns and those responsible for them by 31 March 2020 as required by PACE).

³⁶ PACE, *The functioning of democratic institutions in Poland*, Resolution 2316(2020), para. 11.

³⁷ See e.g. Amnesty International, *Poland: Free Courts, Free People. Judges standing for their independence*, 4 July 2019 ("One account named KastaWatch routinely published tweets amounting to online harassment and abuse of judges known for their criticism of the "reform" of judiciary ... There are indications that KastaWatch draws on classified or semi-classified information from government authorities").

³⁸ PACE, *The functioning of democratic institutions in Poland*, report, op. cit., para. 104.

³⁹ See e.g. *Świadkowie obciążają sędziego Morawiec. Szokujące zeznania ws. szefowej „Themis”*, *TVP info*, 10 October 2020; M. Jalszewski, *Wiadomości* TVP uderzają w sędziego Beatę Morawiec przeciekami z akt prokuratury, *OKO.press*, 11 October 2020.

⁴⁰ This has been done against specific individuals, for instance, before a disciplinary hearing of a judge such as Judge Beata Morawiec (see fn above), or after specific judgements (see e.g. OSCE-ODIHR, Republic of Poland.

also been used to finance defaming campaigns against judges.⁴¹ **In addition to the European Parliament and PACE, the existence of large-scale propaganda against the judiciary in Poland has been criticised by the UN Special Rapporteur on the independence of judges and lawyers** who has “noted with concern that the negative and unfair rhetoric against judges hampered public trust and confidence in the judiciary and undermined the capacity of the judiciary to decide the matters before it impartially and in accordance with the law”.⁴²

28. It is well established that judges have a fundamental right to privacy.⁴³ Indeed, to give the example of Article 7 of the EU Charter of Fundamental Rights, which corresponds to that guaranteed in Article 8 ECHR, this fundamental right is guaranteed to *everyone*. In other words, judges are also entitled to Article 8 ECHR protection.⁴⁴ This means inter alia that they must be free to join associations without being obliged to disclose their membership as any such obligation would be an interference with “their right to privacy concerning such sensitive data”.⁴⁵ And while the right to respect for private and family life is not absolute, this right can be only be subject to restrictions if these restrictions are themselves prescribed by law, pursue a legitimate aim and are necessary in a democratic society.

29. Considering the specific context existing in Poland, it is submitted that the privacy rights of the most vocal Polish judges have been deliberately and systemically violated, in particular via the criminal leaking of judges’ personal information and files, without Polish authorities taking any active step to remedy the situation. On the contrary, **Polish authorities, by adopting the “muzzle law”, have adopted a legislation which violates the right to privacy of all judges.** As noted for instance by the European Commission, the “muzzle law” introduces provisions requiring judges to disclose specific information about their non-professional activities which are **incompatible with the right to respect for private life** and the right to the protection of personal data.⁴⁶ The same law has also been denounced by the European Commission and the European Parliament for violating judges’ freedom of expression.⁴⁷

Parliamentary elections 13 October 2019, 14 February 2020, p. 18, fn 85: when forced by court orders to air an apology and a correction, TVP “supplemented its apologies with strong criticism of the judiciary and personal attacks against the respective judges”). See also A. Applebaum, “The Disturbing Campaign Against Poland’s Judges”, *The Atlantic*, 28 January 2020 regarding the existence of a TV programme called “*Kasta* (“The Caste”), which depicts judges as corrupt and greedy”.

⁴¹ A. Sanders and L. von Danwitz, Defamation of Justice – Propositions on how to evaluate public attacks against the Judiciary, *VerfBlog*, 31 October 2017.

⁴² *Report of the Special Rapporteur on the independence of judges and lawyers*, Diego García-Sayán, 17 July 2020, A/75/172, para. 79 referring to the country mission report, (A/HRC/38/38/Add.1, paras. 17–19 and 79).

⁴³ See e.g. French Conseil supérieur de la magistrature/High Council for the Judiciary, *Compendium of the Judiciary’s Ethical Obligations. The Values of the Judiciary*, first published in 2010 and revised in 2019, p. 50.

⁴⁴ *Özpinar v. Turkey*, Application no. 20999/04, 19 October 2010.

⁴⁵ Council of Europe, CCJE Opinion No. 23 (2020), The role of association of judges in supporting judicial independence, 6 November 2020, para. 57.

⁴⁶ European Commission, Rule of Law: European Commission launches infringement procedure to safeguard the independence of judges in Poland, IP/20/772, 29 April 2020. See also ODIHR Urgent Interim Opinion on the “muzzle law”, 14 January 2020, para 66 (mandatory disclosure requirement of judges’ membership is contrary to international standards).

⁴⁷ See *ibid* and see also European Parliament resolution of 17 September 2020, *op. cit.*, para. 31.

V. European and international standards governing judges' right to freedom of expression in a context where the integrity and independence of the judiciary is under systemic threat⁴⁸

30. Prohibiting any political activity of judges and/or using (or threatening to use) disciplinary proceedings and/or sanctioning judges for speaking publicly in defence of the rule of law cannot amount to a legitimate objective of general interest, let alone a necessary and proportionate limitation on the right to freedom of expression of judges.⁴⁹ It is furthermore submitted that **judges are under a professional and collective duty to speak up in defence of the rule of law**. This professional and collective duty is well codified, for instance in the 2013 Sofia Declaration of the ENCJ.⁵⁰ The recently revised French *recueil des obligations déontologiques des magistrats* is also worth quoting as it similarly makes clear that **judges are under a duty to “defend the independence of the judicial authority”**.⁵¹

31. **In a context where legislative changes and the measures adopted on the basis of these changes have led to the activation of exceptional monitoring mechanisms** such as the EU's Article 7 TEU procedure and the Council of Europe's full monitoring procedure due to concerns about the existence of a systemic threat to the rule of law in Poland,⁵² **any limitation on judges' freedom of expression must be presumed to violate this fundamental right in a situation where judges, individually or collectively, speak out on matters that affect the judiciary**. At the same time, in such a situation, judges, individually and collectively, must be considered as being under a **professional duty to state clearly and cogently their opposition to any proposal, change and/or measure which threatens or undermines judicial independence and/or targets a judge for his/her defence of the rule of law** in any of its components such as judicial independence.

VI. Concluding submission

32. Considering that Polish authorities have given themselves the power to **“interfere throughout the entire structure and output of the justice system”**;⁵³ have legalised the violation of EU and ECHR rule of law requirements when they adopted the “muzzle law”; have encouraged and engaged in repeated smear campaigns against judges while simultaneously organising a new disciplinary regime for judges which enables them *inter alia* to punish judges on account of the content of their judgments and/or the extra-judicial speech in defence of judicial independence, it is submitted that all Polish judges now face a system which has organised the *structural* violation of their fundamental rights and in particular, their right to a fair trial, their right to respect for private life, their right to freedom of expression and their right to an effective domestic remedy.

⁴⁸ This is a shortened version of the Section on judges' freedom of expression to be found in the TPI previously submitted to your Court on 26 October 2020 by the present Interveners in the Case of *Żurek v Poland* (39650/18).

⁴⁹ European Parliament resolution of 17 September 2020, op. cit., para. 31.

⁵⁰ ENCJ, *Sofia Declaration on judicial independence and accountability*, 7 June 2013, para. vii. See previously UNODC, *Commentary on the Bangalore principles of judicial conduct*, September 2007, paras 138-139.

⁵¹ Conseil supérieur de la magistrature/High Council for the Judiciary, *Compendium of the Judiciary's Ethical Obligations. The Values of the Judiciary*, first published in 2010 and revised in 2019, chapter I, pp. 8-9. For further analysis, see S. Platon, *French Law is NOT a Model for the Polish Bill on Disciplining Judges*, *VerfBlog*, 17 January 2020.

⁵² PACE decides to open monitoring of Poland over rule of law, 28 January 2020.

⁵³ 2019 European semester report for Poland, 27 February 2019, SWD(2019) 1020 final, p. 42.