IN THE EUROPEAN COURT OF HUMAN RIGHTS
(FIRST SECTION)

Re: *Żurek v Poland* (Application no. 39650/18)

WRITTEN SUBMISSION ON BEHALF OF THE THIRD PARTY INTERVENERS

Stichting Rechters voor Rechters
&
Professor Laurent Pech

24 October 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 7 October 2020 in the case of *Żurek v Poland* (application no. 39650/18) pursuant to Rule 44(3) of the Rules of Court.

2. The case of *Żurek v Poland* concerns the premature termination of a judge's mandate as a member of the National Council of the Judiciary ("the NCJ"), his dismissal as spokesperson for that organ, and the alleged campaign to silence him.

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 ever since the European Commission activated its Rule of Law Framework in January 2016;[1] Second, the key findings made by these EU institutions as well as the European Network of Councils for the Judiciary ("the ENCJ") as regards the NCJ following its re-establishment in 2018 will be summarised; Third, a brief overview of the most important judgments and orders of the European Court of Justice ("the ECJ") in relation to the rule of law crisis in Poland will be offered; 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 proceedings[2] and/or unprecedented sanctions,[3] will be briefly reviewed.

4. Four main submissions are made: First, it is submitted that 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, 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; Second, the existence of systemic and generalised deficiencies as regards the rule of law in Poland has revealed a now well established pattern whereby Polish authorities, including the courts they have captured or the new bodies they have created, deliberately ignore national but also EU rulings they do not approve of, with the ECJ judgment of 19 November 2019 in the *AK* case formally "voided" on 23 September 2020 by the so-called "Disciplinary Chamber"; Third, European and international standards when it comes to freedom of expression of judges not only protect their right to speak up to defend the rule of law and judicial independence but also imply a duty to speak up in a situation where their country is experiencing a systemic threat to the rule of law as evidenced by the activation

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[1] 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 the state of the rule of law in Poland, see Poland's Civil Development Forum (authors: 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.

[2] See e.g. PACE, *The functioning of democratic institutions in Poland*, report, Doc. 15025, 6 January 2020, 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").

[3] See e.g. Rechters voor Rechters, "Suspension and Salary Reduction for Critical Polish Judge Juszczyszyn", 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 disciplinary proceedings targeting judges was suspended by the ECJ on 8 April 2020. More details *infra*).

of exceptional monitoring mechanisms by both the EU and the Council of Europe; Fourth, due to 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 in EU Member States, it is submitted that the right to an independent tribunal must be considered as being no longer guaranteed for any suspected person brought to trial in Poland or more broadly, any person targeted by national authorities, due to multiple legislative changes enabling the executive to interfere at will throughout the entire structure and output of Poland's justice system.

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

5. With the exception of the findings made in relation to the NCJ which are outlined in the next Section due to its specific relevance, 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.

(i) Lack of effective constitutional review

6. As noted by the European Commission,[4] 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 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,[5] 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

[4] 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.

[5] 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.

CT under these circumstances **can no longer be considered as providing effective constitutional review**.

(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 judges[6] 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 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.**

(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,[7] 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**.[8] 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.[9]

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

[6] 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.

[7] 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.

[8] 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.

[9] European Parliament resolution of 17 September 2020, op. cit., para. 23.

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 to the Supreme Court in violation of a freezing order issued by Poland's Supreme 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 Polish authorities. In this resolution, Poland's Supreme Court denounced the fact that the individuals appointed "must have been aware of the fundamental doubts concerning the new procedures for the appointment to the office of a judge of the Supreme Court and the status and membership of the National Council for the Judiciary as a body participating in the procedure of judicial appointment" as well as knew "that the Supreme Administrative Court had suspended the effect of the resolutions of the National Council for the Judiciary concerning them, and yet they accepted appointment to the position of a judge of the Supreme Court".[10] Unsurprisingly, the unlawfully composed CT (see point (i) above) **annulled the resolution regardless of its obvious lack of jurisdiction for doing so. One may note that the unlawfully composed CT also violated EU law when it did so**.[11]

(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" and the "20-year reach of the extraordinary appeal … which means that the extraordinary appeal could result in the repeal of final judgments dating back to October 1997" and "could even justify, for 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."[12]

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.[13]

(v) Changes made to the disciplinary regime

14. In its fourth Recommendation of December 2017, the Commission underlined that the disciplinary regime established by the law on the Supreme Court raises 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

[10] For extensive references and further analysis, see L. Pech, *Dealing with 'fake judges' under EU Law*, op. cit.
[11] 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").
[12] 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.
[13] PACE, The functioning of democratic institutions in Poland, Resolution 2316(2020), para. 7.4.

judges and the influence of President of the Republic and the Minister of Justice on the disciplinary officers. On 3 April 2019, the European 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, as required by the ECJ. This action is now pending before the ECJ (Case C-791/19). This was followed by the launch of a new infringement action in relation to what is informally known as Poland's 'muzzle law' on 29 April 2020, which is however yet to reach the ECJ at the time of writing.[14] 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 be 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.**"[15]

(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 for failure to fulfil obligations brought by the Commission and held that Poland had failed to fulfil its obligations under EU law, first, by establishing a different 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.[16] 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.**

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[14] European Commission, "Rule of Law: European Commission launches infringement procedure to safeguard the independence of judges in Poland", IP/20/772, 29 April 2020.
[15] European Parliament resolution of 17 September 2020, op. cit., paras 31 and 32.
[16] 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.

III. Key findings made by the European Commission, the European Parliament and the ENCJ regarding Poland's new 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." 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…"[17]

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

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 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 now, as previously noted, the subject of an infringement procedure. **This "muzzle law"**, as observed by the European Commission but also the Venice Commission, **has "legalised" the**

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

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*.[18] 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.[19]

V. EU and international standards governing judges' right to freedom of expression in a context where the integrity and independence of the judiciary is threatened

23. According to both the European Commission and the European Parliament, **Poland's new disciplinary regime for judges is not compatible with the right to freedom of expression but also the right to respect for private life as guaranteed under EU Law**. For 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 as guaranteed by the Charter of Fundamental Rights of the EU and the General Data Protection Regulation.[20] For the European Parliament, the "new provisions prohibiting any political activity of judges, obliging judges to disclose publicly their membership in associations and restricting substantively the deliberations of judicial self-governing bodies … go beyond the principles of legal certainty, necessity and proportionality in restricting the judges' freedom of expression."[21]

24. In this context, it is worth noting that the **European Parliament has formally denounced "the smear campaign against Polish judges and the involvement of public officials therein**."[22] One particularly disturbing aspect of the smear campaign against Polish judges, which has been ongoing for many years,[23] was the secret establishment of a "troll farm" hosted within the Ministry of Justice.[24] **The large-scale propaganda against the judiciary in Poland has also 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".[25]

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[18] *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: The legislative amendments brought about by the muzzle law "are seemingly designed to have a nullifying effect" on the ECJ *AK* ruling. The Venice Commission also noted (para 36) that the muzzle law significantly curtails "the possibility to examine the question of institutional independence of Polish courts by those courts themselves. This approach raises issues under Article 6 § 1 of the ECtHR".

[19] 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>

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

[21] European Parliament resolution of 17 September 2020, op. cit., para. 31.

[22] Ibid., para. 32.

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

[24] PACE, *The functioning of democratic institutions in Poland*, report, Doc. 15025, 6 January 2020, 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).

[25] *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).

25. As a matter of principle, under EU law, "Freedom of expression, as an essential foundation of a pluralist, democratic society reflecting the values on which the Union, in accordance with Article 2 TEU, is based, constitutes a fundamental right guaranteed by Article 11 of the Charter of Fundamental Rights of the European Union which, pursuant to Article 6(1) TEU, has the same legal value as the Treaties."[26] While EU law, in line with ECHR law, does not consider freedom of expression to be an absolute right, limitations on its exercise must be provided for by law and respect the essence of that right and the principle of proportionality, namely if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. As noted by the European Parliament, however, using 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.

26. It is furthermore submitted that it is now well-established 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: "The prudent convention that judges should remain silent on matters of political controversy should not apply when the integrity and independence of the judiciary is threatened. There is now a collective duty on the European judiciary to state clearly and cogently its opposition to proposals from government which tend to undermine the independence of individual judges or Councils for the Judiciary."[27]

27. 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"** and "enjoy the rights granted to any citizen to a join a political party, trade association, association … However, they may not be bound by obligations or constraints that are liable to restrict their freedom of thoughts or action and undermine their independence".[28] In addition, while judges "must refrain from using expressions or comments in their written and spoken communications that … are likely to undermine the image of the judicial system", they "may speak freely within the limits of their position", freely analyse texts as well as adopt "a public, individual or collective position".[29] The current position was clearly outlined in a 1987 opinion issued by the French *Conseil supérieur de la magistrature* ("CSM") in which the CSM explicitly stated that "the obligation of reserve cannot serve to reduce the magistrate to silence or conformism, but must be reconciled with the particular right to independence which fundamentally distinguishes the magistrate from civil servants".[30]

28. Generally speaking, "the ethics of judiciary members must primarily be driven with concern for the independence and quality of the judicial system, of which they form the basis".[31] As such, it is submitted that **limitations on judges' freedom of expression should be subject to the strictest scrutiny when these limitations aim to formally prevent or**

[26] Case C-163/10, para. 31.
[27] ENCJ, *Sofia Declaration on judicial independence and accountability*, 7 June 2013, para. vii. See previously UNODC, *the Commentary on the Bangalore principles of judicial conduct*, September 2007, paras 138-139.
[28] 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.
[29] Ibid., chapter VI, p. 22; chapter VIII, p. 27; chapter VIII, p. 28.
[30] S. Platon, *French Law is NOT a Model for the Polish Bill on Disciplining Judges, VerfBlog,* 17 January 2020.
[31] Conseil supérieur de la magistrature, Compendium, op. cit., conclusion, p. 29.

informally intimidate judges from speaking up in a situation where the independence and/or quality of their national judicial systems is undermined by legislative changes.

29. In this respect, it is further submitted that the European Court of Human Rights must not only take into account the ENCJ Sofia Declaration but also the 2016 judgment of the Inter-American Court of Human Rights in *López Lone et al. v. Honduras* in which the Court inter alia concluded that "at times of grave democratic crises, as in this case, the norms that ordinarily restrict the right of judges to participate in politics are not applicable to their actions in defense of the democratic order. Thus, it would be contrary to the independence inherent in the branches of State, as well as the international obligations of the State derived from its membership of the OAS, that judges could not speak out against a coup d'état. Consequently … the conducts of the presumed victims on the basis of which disciplinary proceedings were instituted against them cannot be considered contrary to their obligations as judges."[32]

30. **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,[33] **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 submissions

31. According to the European Commission, the common pattern of the legislative changes, most of which were outlined above, **"is that the executive and legislative powers now *can interfere throughout the entire structure and output of the justice system*** (our emphasis)".[34] Similarly, according to the European Parliament, the "separate changes to the legislative framework governing the judicial system [in Poland], considering their interaction and overall impact, amount to a serious, sustained and systemic breach of the rule of law, **enabling the legislative and executive powers to *interfere throughout the entire structure and output of the justice system*** (our emphasis) in a manner which is incompatible with the principles of separation of powers and the rule of law."[35]

32. When one adds to this diagnosis the violations of EU rule of law requirements already established by the ECJ and the violations of the ECJ's case law, and in particular its *AK* ruling as well as its *Simpson/HG* ruling,[36] it is submitted that **judicial independence has now been**

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[32] Judgment of 5 October 2015, Series C No. 302, para. 174.
[33] PACE decides to open monitoring of Poland over rule of law, 28 January 2020.
[34] 2019 European semester report for Poland, 27 February 2019, SWD(2019) 1020 final, p. 42.
[35] European Parliament resolution of 17 September 2020, op. cit., para. 37.
[36] C-542/18 RX-II and C-543/18 RX-II: As a matter of EU law, "everyone must, in principle, have the possibility of invoking an infringement" of the fundamental right to an effective remedy before an independent and impartial tribunal previously established by law, which means inter alia that the CJEU but also national courts of EU

structurally disabled by Polish authorities, with the recent "muzzle law" legalising "the structural violation of the most fundamental principles underlying the whole EU legal order".[37] It follows that as a matter of EU law the individual right to an independent and impartial tribunal established by law must now be considered as being systematically violated in Poland due to the fact that Polish authorities **can interfere at will with judicial output and similarly subject to disciplinary proceedings at will any judge whose judicial decisions would not be approved of by the said authorities.** In such an extreme situation, it is furthermore submitted that judges, acting individually or collectively, **are under a professional duty to speak up in relation 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.**

33. In this respect, the judgment of 31 July 2020 of the *Rechtbank* Amsterdam requesting the ECJ to review its so-called "*Celmer* Test"[38] is of particular significance.[39] Following a review of the developments in Poland pre and post adoption of the "muzzle law", the *Rechtbank* Amsterdam held that (i) there is no longer any independent and effective constitutional review in Poland; (ii) the NCJ is no longer a body which is impartial and independent; (iii) the DC is not a court or tribunal within the meaning of EU law;[40] (iv) the independence of the Supreme Court and ordinary courts is no longer guaranteed from a general and structural point of view; (v) disciplinary proceedings have been initiated against several judges merely on account of their judicial work or because they exercised their right to freedom of expression, with disciplinary proceedings furthermore now possible merely for undertaking, as required under EU law, a review of whether a judge or a court complies with the requirements relating to independence required by EU law.

34. In agreement with the *Rechtbank* Amsterdam, it is submitted that due to systemic and generalised deficiencies regarding the independence of the Polish judiciary, the right to an independent tribunal is no longer guaranteed for any suspected person brought to trial in Poland. More broadly, Poland must now be considered a country whose courts must be assumed to lack independence due to the systemic or generalised deficiencies detailed above. Our final submission is that the **existence of these systemic and generalised deficiencies as well as the pattern of deliberate violations of the core components of the rule of law, including the legalised violation of EU rule of law requirements**, must be carefully and fully taken into account by the European Court of Human Rights to inform its assessment in any case which is connected to the rule of law situation in Poland.

Member States "*must be able to check* (our emphasis) whether an irregularity vitiating the appointment procedure" in dispute "could lead to an infringement of that fundamental right."

[37] L. Pech, K.L. Scheppele, W. Sadurski, *Before It's Too Late: Open Letter to the President of the European Commission regarding the Rule of Law Breakdown in Poland, VerfBlog,* 28 September 2020.

[38] For further references and analysis, see P. Bárd, Petra and J. Morijn, *Luxembourg's Unworkable Test to Protect the Rule of Law in the EU: Decoding the Amsterdam and Karlsruhe Courts' post-LM Rulings (Part I), VerfBlog,* 18 April 2020; (Part II), *VerfBlog*, 19 April 2020 ("judicial dialogue between Luxembourg and national courts will likely push the CJEU to move forward and develop its test into a more meaningful one. Should this not happen, EU criminal justice – to a large extent based on mutual trust – will collapse").

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

[40] According to the Dutch court (para. 30), the "disciplinary chamber" is continuing to operate notwithstanding the ECJ order of 8 April 2020.