

16 February 2022

## **RE: NGO letter to EU Ministers on rule of law and human rights situation in Poland**

Dear Minister,

As the EU General Affairs Council prepares to hold a hearing on 22 February on the rule of law in Poland under the Article 7.1 TEU procedure, the undersigned civil society organisations would like to draw your attention to some alarming developments. Since the Council last discussed the situation in June 2021, a severe and steady decline in the respect for EU values in Poland has continued unabated. Despite the numerous actions undertaken by EU institutions since the procedure was launched in 2017, the Polish government has continued to systematically infringe upon those standards and ignore EU recommendations and the EU Court's rulings.

We urge your government to address these developments at the hearing and to spur the Council into action by adopting recommendations and/or holding a vote on a determination that there is "a clear risk of a serious breach" of EU values in Poland under Article 7.1 TEU.

### **Rule of law concerns**

Changes to the disciplinary regime introduced since 2017 have been used to sanction judges for criticising justice reforms and referring cases for preliminary rulings to the Court of Justice of the EU (CJEU). These changes continue to be applied, despite repeated warnings by the Commission, orders for interim measures,<sup>1</sup> and financial penalties for non-compliance with Court orders<sup>2</sup> issued by the CJEU upon finding<sup>3</sup> the new system incompatible with EU rule of law standards. The system has continued to operate, namely with regard to the lifting of immunity and suspension of judges in cases handled by the Disciplinary Chamber of the Supreme Court,<sup>4</sup> an organ whose functioning should have been suspended due to its lack of independence and impartiality as per the CJEU and European Court of Human Rights (ECtHR)'s<sup>5</sup> decisions.

Polish President Duda announced last week that a new bill has been tabled to Parliament providing for the Disciplinary Chamber's dissolution in response to EU criticism. However, this does not appear to answer the Commission's and CJEU's concerns. Under the new bill, after the dissolution Supreme Court judges currently sitting in the Disciplinary Chamber would be transferred to other chambers and a new panel of 11 judges would hear disciplinary cases. Disciplinary Chamber judges would remain at the Supreme Court, and a new chamber would be set up to hear disciplinary cases, composed of judges appointed with the involvement of the same politicised body (i.e., the National Council of the Judiciary, NCJ). There is thus a high risk that the proposed change would be cosmetic and that the compromised system would continue to operate under a different name.

Both the CJEU and the ECtHR have repeatedly denounced the impact of judicial reforms implemented since 2015. In particular, the two courts criticised the Polish courts' composition and new rules for the appointment of judges to the Constitutional Tribunal<sup>6</sup> and to different chambers of

1 CJEU, [Order of the Vice-President of the Court in Case C-204/21 R, \*Commission v Poland\*, 14 July 2021](#); CJEU, [Order of the Court \(Grand Chamber\) in Case C-791/19 R, \*Commission v Poland\*, 8 April 2020](#).

2 CJEU, [Order of the Vice-President of the Court in Case C-204/21 R, \*Commission v Poland\*, 27 October 2021](#).

3 CJEU, [Judgment of the Court \(Grand Chamber\) of 15 July 2021 in Case C-791/19, \*Commission v Poland\*](#); CJEU, [Judgment of the Court \(Grand Chamber\) of 6 October 2021 in Case C-478/19, \*Commission v Poland\*](#).

4 ECtHR, I Section, [Judgment of 22 July 2021 in the case of \*Reczkowicz v Poland\*, Application no. 43447/19](#).

5 ECtHR, I Section, [Judgment of 7 May 2021 in the case of \*Xero Flor v Poland\*, Application no. 4907/18](#).

6 ECtHR, I Section, [Judgment of 8 November 2021 in the case of \*Dolinska-Ficek and Ozimek v Poland\*, Applications nos. 49868/19 and 57511/19](#).

the Supreme Court.<sup>7</sup> They found them incompatible with minimum standards that would guarantee judicial independence and people's right to independent and impartial justice administered by a legitimate tribunal established by law and free from political interest and undue influence by other State powers. Most recently, the ECtHR found that the Civil Chamber of the Supreme Court does not meet the standards required for a court to be considered independent within the meaning of the European Convention.<sup>8</sup>

Polish authorities' consistent refusal to meaningfully comply with the Commission's recommendations and to implement orders and decisions by Europe's top courts demonstrate their disregard for the obligations they committed to respecting when adhering to the regional systems they represent. In parallel, State authorities, including current Justice Minister and Public Prosecutor General Ziobro, continue to refer cases to the politically-compromised Constitutional Tribunal to challenge CJEU and ECtHR judgments and undermine their effects in the Polish legal order. This not only openly refutes these courts' authority, but constitutes a violation of Poland's obligations under the EU Treaties, namely the fundamental principle of primacy of EU law over national law.

### **Rule of law deficits impact women's sexual and reproductive rights**

The Polish government's weakening of judicial independence and impartiality has gravely affected the health and lives of women and girls in Poland. The politically compromised Constitutional Tribunal acted to remove grounds for access to abortion care from Poland's law, which resulted in a near-total abortion ban, with devastating consequences for women's health and lives. Over the past year since the decision took effect, at least three women have died as a result of being denied life-saving reproductive health care. The situation continues to deteriorate.

The roll back of reproductive rights in Poland and ongoing threats of further regression are contrary to fundamental rule of law principles of legal certainty as well as principles of international law that prohibit states from taking measures that weaken or remove protections for human rights. Poland systematically refuses to comply with judgments of the ECtHR, including landmark rulings on reproductive rights. In December 2021, the Committee of Ministers of the Council of Europe again called on the Polish authorities to urgently take steps to implement three judgments on abortion that were issued more than 10 years ago. The authorities have taken no meaningful action in response.<sup>9</sup> Since the Constitutional Tribunal's decision in October 2020, thousands of women have submitted cases to the ECtHR alleging multiple violations of human rights protected by the Convention. Their efforts to seek justice and reparations by applying to the ECtHR as their reproductive rights are continuously undermined by the Polish authorities are a clear manifestation of the denial of access to justice in Poland and substantiate the urgent need for EU action.

Further attacks on sexual and reproductive rights include repeated attempts to fully criminalise abortion while increasing penalties for women and care providers, and the proposal to introduce mandatory registration of all pregnancies. It also includes moves to establish an Institute for Family and Demography mandated to intervene in a wide range of judicial and administrative proceedings, including divorce cases and cases regarding LGBTI families, and to access data gathered by any public body in Poland, including on pregnancies and miscarriages.

### **Rule of law crisis impacts rights of LGBTI people**

Systemic rule of law violations also directly affect the human rights of LGBTI people and their defenders, who have been regularly under attack by the government and law enforcement officials, in line with the ruling Law and Justice (PiS) party's agenda. LGBTI people experience obstruction in

<sup>7</sup> ECtHR, I Section, [Judgment of 3 February 2022 in the case of \*Advance Pharma v Poland\*, Application no. 1469/20.](#)

<sup>8</sup> Helsinki Foundation for Human Rights, *Sąd nad sądem. Zmiany wokół Sadu Najwyższego w latach 2017-2021*, available at: <https://www.hfhr.pl/wp-content/uploads/2021/12/Sad-nad-sadem-FIN.pdf>.

<sup>9</sup> Please see the Poland chapter of ILGA-Europe's submission to the European Commission's consultation on the 2022 Rule of Law report, accessible at: <https://ilga-europe.org/sites/default/files/Attachments/ILGA-Europe%20submission%20to%202022%20EC%20Rule%20of%20Law%20Report.pdf>

access to justice, interference in judicial proceedings by the Ministry of Justice and Prosecutor General, and limitations on their freedom of expression and peaceful assembly.<sup>10</sup> Although a few Polish municipalities revoked the so-called “anti-LGBT resolutions” following EU threats to withdraw funding, around 80 regional and local governments in Poland continue to label themselves as “against LGBT ideology”, or have discriminatory Family Rights Charters in place. A draft bill aiming to ban Pride events and other public gatherings that allegedly promote non-heterosexual orientations is currently under consideration in the Polish Parliament. In the current climate, LGBTI people in Poland are increasingly marginalised and targeted, including through physical and verbal attacks. According to Polish NGO Campaign Against Homophobia (*Kampania Przeciw Homofobii*, KPH)’s research, this resulted in nearly half of LGBTI people experiencing symptoms of depression and a growing number of them (12%) planning to leave the country due to homophobic and transphobic attacks by the authorities.<sup>11</sup>

### Civic space

Civic space has rapidly deteriorated. Faced with significant restrictions and reduced access to effective remedies to challenge rights’ violations, civil society organisations and human rights defenders have mobilised across Poland to denounce rule of law backsliding and reclaim their rights. Protests across the country, including in response to rulings challenging EU law primacy, have been met with violence and measures that undermine civil society’s rights to peaceful assembly, expression and association.<sup>12</sup> Human rights defenders—especially those working on women’s rights, sexual and reproductive health and rights, and LGBTI rights—have been targeted<sup>13</sup> with smear campaigns, threats, police brutality and judicial harassment, and criminal charges. The authorities have consistently failed to promptly, effectively, thoroughly, and impartially investigate such incidents.

Restrictive reforms affecting human rights or burdening the sector require civil society organisations to remain constantly on the defensive, draining their resources and reducing their capacity to focus on their core mandate. These include reforms to the educational system, which would increase governmental control over school curricula and extra-curricular activities and significantly restrict the possibility for civil society organisations to conduct educational activities on issues frowned upon by the government, such as anti-discrimination and comprehensive sexuality education.<sup>14</sup> A [draft bill](#) that would essentially criminalise anyone providing sexuality education or information on sexual and reproductive health and rights, which Parliament sent to committees in April 2020, could be re-tabled for consideration.

Access to financial resources has also become increasingly challenging for independent civil society organisations. Civil society organisations working on rule of law and human rights face significant restrictions in access to funding administered by State institutions, including the National Freedom Institute, to the benefit of pro-government organisations. These also profit from privileged access to policy-making and a favourable political climate. Such changes represent a threat to independent NGOs, and could lead to a gradual transformation altering the fabric of Polish civil society.<sup>15</sup>

<sup>10</sup> [CM/Del/Dec\(2021\)1419/H46-25, \*Tysiąc and R.R.\* \(Applications Nos. 5410/03, 27617/04\), \*P. and S.\* \(Application No. 57375/08\) v. Poland, Decision of 2 December 2021.](#)

<sup>11</sup> Campaign Against Homophobia, Centre for Research on Prejudice at the University of Warsaw and Lambda Warszawa: “*The social situation of LGBT people in Poland in the years 2019-2020*”, available at: [https://kph.org.pl/wp-content/uploads/2021/12/Raport\\_Duzy\\_Digital-1.pdf](https://kph.org.pl/wp-content/uploads/2021/12/Raport_Duzy_Digital-1.pdf)

<sup>12</sup> <https://findings2021.monitor.civicus.org/europe-central-asia.html#countries-of-concern>

<sup>13</sup> <https://monitor.civicus.org/updates/2022/01/21/ongoing-violations-civic-freedoms-polandbelarus-border-further-threats-lgbtqi-rights/>;  
<https://bip.brpo.gov.pl/sites/default/files/Raport%20KMPT%20z%20wizytacji%20jednostek%20politycznych%20o%20zatrzymaniach%20w%20Warszawie%207.08.2020,%207.09.2020.pdf>.

<sup>14</sup> <https://astra.org.pl/polish-minister-tightens-the-states-control-over-educational-system/>;  
<https://civicspacewatch.eu/wp-content/uploads/2022/01/Poland.pdf>

<sup>15</sup> <https://civicspacewatch.eu/wp-content/uploads/2022/01/Poland.pdf>.

## **Media freedom**

Media freedom has also deteriorated over the past few months, following state-owned oil giant PKN Orlen's acquisition of media outlet *Polska Press* and the dismissal of its employees, while Poland's access to public information law is under review by the politically captured Constitutional Tribunal. At the same time, Poland has seen a significant increase in strategic lawsuits against public participation (SLAPPs) targeting journalists and other public watchdogs.

These alarming developments require an urgent and serious response by the Council. EU member states' continued hesitance to use the procedure laid down in Article 7.1 TEU to its full potential can only embolden the Polish government and lead to further attacks against EU values. Immediate, effective and concerted action by the Council, backed by the other EU institutions, is needed to halt the deterioration and meet Polish and EU civil society's expectation that rule of law and human rights violations have no place in the EU and that those who flout these principles will be held to account. To produce this effect and not leave any violation unchecked, any such action by the Council should look into the respect by Poland for all Article 2 TEU values, as recommended also by the European Parliament in its October 2021 resolution.

We especially urge the Council to adopt clear, specific and concrete recommendations that the Polish government will be requested to implement within a clear timeframe. We also call on your leadership to muster the four-fifths majority needed to determine, pursuant to Article 7.1 TEU, that there is "a clear risk of a serious breach" of the values referred to in Article 2 TEU in Poland.

We stand ready to provide any further information you may require and to discuss this further.

Yours sincerely,

## **International NGOs advocating at the EU-level**

Amnesty International

Center for Reproductive Rights

Civil Liberties Union for Europe

Democracy Reporting International (DRI)

European Civic Forum

Human Rights Watch

ILGA-Europe - European region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association

International Commission of Jurists (ICJ)

International Federation for Human Rights (FIDH)

International Planned Parenthood Federation European Network (IPPF EN)

Open Society European Policy Institute (OSEPI)

## **Organisations from EU member states**

Aditus Foundation (Latvia)

Association "Papardes zieds" (Latvia)

Austrian Family Planning Association (OGF) (Austria)  
Campaign Against Homophobia (Poland)  
(The) Daphne Caruana Galizia Foundation (Malta)  
(The) Family Federation of Finland - Väestöliittory (Finland)  
Federation for Women and Family Planning (Poland)  
Finnish League for Human Rights (Finland)  
Great Coalition for Equality and Choice (Poland)  
Helsinki Foundation for Human Rights (Poland)  
Hungarian Helsinki Committee (Hungary)  
Institute of Public Affairs (IPA) (Poland)  
Internationale Liga für Menschenrechte (Germany)  
Liga voor de Rechten van de Mens (The Netherlands)  
Ligue des droits de l'Homme (LDH) (France)  
Ligue des droits humains (Belgium)  
Netherlands Helsinki Committee (The Netherlands)  
(Le) Planning Familial (MFPF) (France)  
Portuguese League for Human Rights – Civitas (Portugal)  
Pro familia Bundesverband (Germany)  
RFSU, The Swedish Association for Sexual and Reproductive Rights (Sweden)  
Sedra-Federación Planificación (Spain)  
SeNonOraQuando? (Italy)  
Sensoa vzw, the Flemish Centre of Expertise on Sexual Health (Belgium)

### **Organisations from non-EU countries**

Albanian Human Rights Group (AHRG) (Albania)  
Human Rights Association (İHD) (Turkey)