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## **POLISH POPULISM AND THE COUNCIL OF EUROPE: HOW POLAND IS FAILING TO ADHERE TO ITS CORE OBLIGATIONS AND WHAT IT MEANS**

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### **Abstract**

This paper explores the relationship between the Polish state and the Council of Europe (CoE). It examines the actions of the Law and Justice party and how such actions have affected the country's relationship to the CoE, with particular reference to its three core values: Human Rights, Democracy, and the Rule of Law. It will determine that as a consequence of recent policies and laws the state is no longer adhering to its obligations.

**Key words:** Poland, International Relations, Human Rights

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### **Introduction**

In recent years Poland has joined the likes of Hungary and Italy to have allowed populism to threaten their fragile liberal democracy. Such autocracy has emerged as a problem in Europe in recent years, where from 2000 to 2017 the number of populist parties in existence almost doubled.<sup>2</sup> Pippa Norris calls this global movement 'contemporary authoritarian populism',<sup>3</sup> as populist parties who achieve power then implement authoritarian policies to retain it. Pinpointing examples of this phenomenon can prove difficult as populism is hard to define, but one key aspect is the idea of 'them' against 'us', or more specifically the 'pure people' against the 'corrupt elite'.<sup>4</sup> In Poland this takes the form of 'true poles' against 'the worst sort of poles' that are against traditional values.<sup>5</sup> The party that pushes this rhetoric in Poland is the Law and Justice Party, or Prawo i Sprawiedliwość ('PiS'), who won the elections of 2015 with 37.5% of the vote and have been in power ever since. Their win was unexpected as 'no economic or political crisis of major proportions preceded the takeover',<sup>6</sup> and so the drastic shift in direction came as a shock to Europe. However, what was clear was that the ruling centrist party Civic Platform, Platforma Obywatelska ('PO') had underestimated the dissatisfaction of the people in regards to certain elements of society such as access to health care, and that PiS took advantage of this, offering quick solutions to complex problems.

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<sup>2</sup> Wojciech Sadurski, Poland's Constitutional Breakdown (Oxford Scholarship Online 2019)

<sup>3</sup> Pippa Norris, 'It's Not Just Trump. Authoritarian Populism is Rising Across the West. Here's Why' The Washington Post (New York, 11 March 2016) < <https://www.washingtonpost.com/news/monkey-cage/wp/2016/03/11/its-not-just-trump-authoritarian-populism-is-rising-across-the-west-heres-why/> > accessed 2 December 2020

<sup>4</sup> Sadurski (n 1)

<sup>5</sup> Joanna Fomina and Jacek Kucharczyk, 'The Specter Haunting Europe: Populism and Protest in Poland' (2016) 27(4) Journal of Democracy < <https://muse.jhu.edu/article/633752> > accessed 22 November 2020

<sup>6</sup> Sadurski (n 1)

The prize for PiS was the ability to initiate a ‘fundamental authoritarian transformation’ of the state, mainly by dismantling the institutions designed to provide checks and balances on the government.<sup>7</sup> Marcin Matczak notes that PiS has launched a ‘sustained and unprecedented assault on the separation of powers and the independence of the judiciary’, and has convinced the people to reevaluate their commitment to the Rule of Law.<sup>8</sup> This is a classic autocratic move, and follows the playbook created by Hungary. Gabor Halmai notes that removals of checks and balances on governments, dismantling of guarantees on fundamental rights, and lack of fair elections, were moves made by Viktor Orbán’s government in order to keep hold of power.<sup>9</sup> PiS has made similar reforms to cement its own influence. For example, they have consistently demonstrated that they hold little regard for the Council of Europe’s (CoE) notions of the Rule of Law, Democracy, and Human Rights, which are the fundamental principles of the institution in which they have been a member since 1991. Instead they implement their own values and policies that contradict their obligations to the CoE.

This study explores whether Poland as a state is adhering to the core CoE values or whether the little regard the government holds for them has prevailed. An analysis of this will show that Poland is breaching its obligations in every way analysed, generating a threat to adequate protections in the country, but a success for the Polish populist party PiS and their autocratic reforms. The connection to populism will allow the study to determine the causes of the reforms, and how PiS are so successful in enacting them. Ultimately the paper will conclude that PiS’ reforms have resulted in the state being a member of the CoE in name only, and as a result it would not be surprising if in the coming years action was taken against Poland to remove it from the institution, and the community of democratic states.

PiS’ intention to steer the Polish ship away from warm waters of the Council of Europe was made clear in July 2020, when they announced their intention to withdraw Poland from the Istanbul Convention (The Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence). The purpose of the Convention is to ‘protect women against all forms of violence’ as well as to eliminate discrimination against women, among other objectives.<sup>10</sup> PiS wanted to leave the Convention as they claimed it posed a threat to traditional families and their values.<sup>11</sup> This is a line that the government employs to justify a majority of their actions, and is effective because it speaks to a proportion of the population who felt neglected under previous governments. This is furthered by the fact Poland is a strongly Catholic nation (around 87% of the population is regarded as Roman-Catholic)<sup>12</sup>, and so PiS’ rhetoric often falls in line with their teachings. Whilst the motive of the every-day person is not to exclude those who fall outside of the ‘traditional family’ regime, the commitment PiS has to protecting them from the liberal reforms in the west generates large swathes of support. When justifying the withdrawal, Poland’s Justice Minister Zbigniew Ziobro claimed that the Convention was ‘a feminist creation aimed at justifying gay ideology’.<sup>13</sup> Ziobro pulled on the populist ideal of ‘them’ against ‘us’ to paint the Convention as a threat and reduce public support. He suggested that the creators and beneficiaries of the Convention were trying to push a liberal agenda (gay ideology) which would threaten the lives of the ordinary Polish citizen, an example of the menacing ‘other’ taking away ‘proper Polish’ people’s traditional values and society. This example shows how effective PiS are at engaging with the insecurities of the population in order to justify actions that they would not normally support. The reason for the withdrawal is that PiS took issue with provisions like article 12 of the convention, which determines that culture and religion cannot be a justification for acts of violence.<sup>14</sup> Article 14 also proclaims that men and women should be taught

<sup>7</sup> *ibid*

<sup>8</sup> Marcin Matczak, ‘Poland’s Rule of Law Crisis: Some Thoughts’ (2019) 11 *Hague Journal on the Rule of Law* < <https://link.springer.com/article/10.1007/s40803-019-00117-y> > accessed 22 November 2020

<sup>9</sup> Gabor Halmai and Reconnect Europe, ‘Democratic Backsliding in the United States and Europe: Causes, Consequences, and Prospects’ Webinar (12 May 2021)

<sup>10</sup> The Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (adopted 11 May 2011 entered into force 1 August 2014) CETS No.210 (Istanbul Convention), article 1

<sup>11</sup> Marc Santora, ‘Poland Considers Leaving Treaty on Domestic Violence, Spurring Outcry’ *The Washington Post* (New York, 27 July 2020) < <https://www.nytimes.com/2020/07/27/world/europe/poland-domestic-violence-treaty.html> > accessed 2 December 2020

<sup>12</sup> European Commission, ‘Poland Population: Demographic Situation, Languages and Religions’ (EURYDICE, 4 March 2021) < [https://eacea.ec.europa.eu/national-policies/eurydice/content/population-demographic-situation-languages-and-religions-56\\_en](https://eacea.ec.europa.eu/national-policies/eurydice/content/population-demographic-situation-languages-and-religions-56_en) > accessed 4 December 2020

<sup>13</sup> Santora (n 10)

<sup>14</sup> Istanbul Convention articles 12 and 13

as equals and not assigned stereotyped roles.<sup>15</sup> The Catholic church is a powerful institution in Poland, with influence over some government members and citizens – 64% of Poles see Catholicism as a key component of their national identity.<sup>16</sup> As such, Catholic values are revered, and PiS would have seen this ‘restriction’ to them as unpalatable, as well as an effective justification for withdrawing from the whole statute; effectively diminishing protections for women whilst encouraging the population to look the other way.

PiS followed up their announcement by arguing that they do much to protect women from violence, and that therefore their adherence to the Convention was inconsequential. On their official webpage they state that they have implemented an Anti-Violence Law and wish to instead apply reforms that ‘wouldn’t be saturated with ideological provisions or a moral revolution’.<sup>17</sup> Poland’s primary legislation on domestic violence was enacted in 2005 under PO – The Counteracting Domestic Violence Act.<sup>18</sup> The act established the Monitoring Committee on Combating Violence in the Family and introduced measures to force an accused to leave a premises occupied jointly with a victim. New reforms have been made in recent months; principally a new law allowing evictions of the accused to be made quicker and without a court order. Police will have more power to choose for themselves the level of the threat to the victim.<sup>19</sup> These provisions are a move in the right direction, but they are limited when faced with the reality of the situation and do not make up for withdrawing from the Convention. According to police statistics, 250,000 people are affected by domestic violence in Poland a year;<sup>20</sup> the Women’s Rights Centre estimates this to be around 800,000 in actuality.<sup>21</sup> This problem is not going to be resolved by reforms that do not even ensure an over-sight body guaranteeing the proper use of power by the police, which would be essential to properly safeguard women. Without it the potential for abuse of the new reforms is significant, and demonstrates that changes like these are half-hearted attempts by the government to placate supporters of the Convention. This is also evidenced by the fact that PiS has reduced funding for combating domestic violence and supporting victims since coming into power, with the money that previously went to relevant NGOs now going to Catholic organisations.<sup>22</sup> As well as this, they slander feminist movements and ideas as dangerous ‘gender ideology’, and have gone as far as to establish an Anti-Gender Ideology Parliamentary Committee in 2014, with the task of protecting ‘traditional families’.<sup>23</sup>

Issues like these add to a long list of failures to protect women and the threat of withdrawing from the Convention indicates that they are no longer willing to try to improve, nor be held to any obligations to. The loss of the Convention to Poland is significant, Lisa Grans argues that the agreement is a ‘potentially powerful tool in the elimination of violence against women’.<sup>24</sup> And, following the announcement of Poland’s intention to withdraw, the Secretary General of the Council of Europe stated that it was ‘highly regrettable and a major step backwards in the protection of women against violence’.<sup>25</sup> This demonstrates the significance of the decision, and that attention is being paid by the CoE to Poland’s regressions. The withdrawal also serves as an

<sup>15</sup> *ibid* article 14

<sup>16</sup> Kyriaki Topidi, ‘Religious Freedom, National Identity, and the Polish Catholic Church: Converging Visions of Nation and God’ (2019) 10 *European Centre for Minority Issues* <<https://www.mdpi.com/journal/religions>>

<sup>17</sup> Law and Justice, ‘The government carries out tasks aimed at preventing violence’ (Law and Justice, 30 July 2020) <<http://pis.org.pl/aktualnosci/rzad-realizuje-zadania-majace-na-celu-zapobieganie-przemocy>> accessed 4 December 2020

<sup>18</sup> The Act on Counteracting Domestic Violence 2005 (PL)

<sup>19</sup> Ministry of Justice, ‘A groundbreaking law to protect victims of domestic violence in Poland’ (Republic of Poland, 29 November 2020) <<https://www.gov.pl/web/justice/a-groundbreaking-law-to-protect-victims-of-domestic-violence-in-poland>> accessed 4 December 2020

<sup>20</sup> Juliette Bretan, ‘New domestic violence law in Poland to immediately remove perpetrators from the home’ (Notes from Poland, 4 May 2020) <<https://notesfrompoland.com/2020/05/04/new-domestic-violence-law-in-poland-to-immediately-remove-perpetrators-from-the-home/>> accessed 4 December 2020

<sup>21</sup> Santora (no 10)

<sup>22</sup> Anna Gwiazda, ‘Right-wing populism and feminist politics: The case of Law and Justice in Poland’ (2020) 1(16) *International Political Science Review* <<https://journals.sagepub.com/doi/pdf/10.1177/0192512120948917>> accessed 23 November 2020

<sup>23</sup> Katarzyna Wojnicka, ‘Masculist Groups in Poland: Aids of Mainstream Antifeminism’ (2016) 5(2) *International J for Crime, Justice, and Social Democracy* <<https://www.crimejusticejournal.com/article/view/802>> accessed 22 November 2020

<sup>24</sup> Lisa Grans, ‘The Istanbul Convention and the Positive Obligation to Prevent Violence’ (2018) 18(1) *Human Rights Law Review* <<https://academic.oup.com/hrlr/article/18/1/133/4857380?login=true>> accessed 4 December 2020

<sup>25</sup> Council of Europe, ‘Poland should not withdraw from the Istanbul Convention, says Secretary General’ (Newsroom, 26 July 2020) <<https://www.coe.int/en/web/istanbul-convention/-/poland-should-not-withdraw-from-the-istanbul-convention-says-secretary-general>> accessed 22 November 2020

indicator of how Poland views its other obligations as a member of the Council of Europe. It is a recent move by the government that demonstrates the approach of PiS, the techniques it uses, and the consequence of this on adherence to its obligations and the impact on the citizens of the Polish state. This was not the first time PiS has challenged CoE values, but it was an event that caught the attention of Council of Europe member states, leading many to question how far Poland had regressed.

## Poland's Obligations as a Member of the Council of Europe

The Council of Europe is an international human rights organisation of 47 member states, and the basis of its work is the promotion of its core values of adherence to Human Rights, Democracy, and the Rule of Law. Poland joined the CoE on 26th November 1991 and became its 25th member state, making it obligated to abide by the core values as it is a pre-requisite for membership. The values are laid on in the Statute to the CoE; under article 3 states have to 'accept the principles of the Rule of Law ... and collaborate sincerely and effectively in the realisation of the aim[s]'.<sup>26</sup> Under articles 7 and 8 of the same statute, if states seriously violate their article 3 obligations their rights of representation can be withdrawn<sup>27</sup> and they can be requested to withdraw from the CoE.<sup>28</sup> These disciplinary measures have not yet been enacted against Poland, but the determination that serious violations of obligations have taken place will show that it is possible that they will be used in the future.

More specific obligations that Poland has to the CoE can be ascertained by their signing and ratification of various Council of Europe treaties. Poland is party to over 90 Council of Europe conventions. This list includes the foundational CoE legislation the European Convention on Human Rights (ECHR). The ECHR was first signed in November 1950 and every new member state since then has been obligated to sign it as part of joining the organisation. The Convention lays down the human rights obligations every member state has and was the first legislation to give binding effect to the obligations under the Universal Declaration of Human Rights.<sup>29</sup> Poland's signing and ratification of the legislation demonstrates its supposed commitment to human rights and allows the Council and the European Court of Human Rights (ECtHR) to have a binding standard by which to hold the state. The following discussion focuses on how effectively Poland fulfils its core CoE obligations, as set out by the CoE Statute, ECHR, and other legislation and publications.

## The Rule of Law, Judiciary and Democracy

One of the challenges PiS has consistently made to its CoE obligations is its disregard for the Rule of Law, which it is committed to upholding as it is a fundamental value of the Council of Europe. Determining what the obligation truly means has historically generated confusion, and so in 2007 The Venice Commission was asked by the Parliamentary Council of the CoE to create a definition of the Rule of Law, and to produce a comprehensive framework of duties and criteria that make up the obligation.<sup>30</sup> The Commission determined that 'there was a consensus on the core elements of the Rule of Law ... which were: legality, legal certainty, prohibition of arbitrariness, access to justice, respect for human rights, non-discrimination and equality before the law'.<sup>31</sup> To easily comprehend these elements, and determine whether states are fulfilling their duties, the Commission created the 'Rule of Law Checklist'. The Checklist can therefore be used to ascertain what Poland's obligations are in this area. The most relevant sections here are Section E on Access to Justice, and Section A on Legality. Section E of the checklist requires states to ensure that the judiciary are independent and not

<sup>26</sup> Statute of the Council of Europe (adopted 1949) CETS No.001, article 3

<sup>27</sup> *ibid* article 8

<sup>28</sup> *ibid* article 7

<sup>29</sup> Council of Europe '70 years of the European Convention on Human Rights' (European Court of Human Rights) <<https://www.echr.coe.int/Pages/home.aspx?p=events/70yearsConvention&c=>> accessed 5 January 2021

<sup>30</sup> Parliamentary Assembly of the Council of Europe (Committee on Legal Affairs and Human Rights), 'Venice Commission's 'Rule of Law Checklist'' Report (17 July 2017) Doc. 14387, section A(2)

<sup>31</sup> European Commission for Democracy Through Law (Venice Commission), 'Rule of Law Checklist' (18 March 2016) CDL-AD(2016)007rev

subject to political influence, in particular from the executive branch of government.<sup>32</sup> Under section A, states should respect the supremacy of the law and not infringe upon it.<sup>33</sup> Using these sections we can analyse the government's actions, in order to determine whether they are compliant with the Rule of Law as the CoE determines it to be.

One of the government's most significant attempts to limit judicial independence through legal reform came in 2017, when a bill was passed that lowered the retirement age of Supreme Court judges from 67 to 65 for men, and from 67 to 60 for women.<sup>34</sup> This in itself was not only discriminatory in terms of gender but threatened the Rule of Law as it was designed as a mechanism for the ruling party to dispose of judges not supportive of their agenda. The President maintained the right to issue five-year extensions to judges at his discretion, meaning that executive political influence was imposed on judges' terms of office, contrary to Section E(1)(a) that advises that the judiciary should 'not [be] subject to political influence or manipulation, in particular by the executive branch'.<sup>35</sup> The National Council of the Judiciary ('NCJ') were allowed input on the issue,<sup>36</sup> but as part of the new reforms the judges sat on the council would no longer be appointed by their peers but instead by the Sejm (the Government's lower house). This politicised the Council, compromising its independence and ability to safeguard the Rule of Law. This meant that there was no longer an independent body overseeing judges' terms in office that could combat the executive influence being exerted. The Venice Commission highlights the need for guaranteeing the independence of the judiciary through an 'an independent judicial council' that can have influence over the careers of judges.<sup>37</sup> This would allow decisions regarding judges to be impartial, which is important to stop the politicisation of the judicial sector. The reforms PiS made to the NCJ contradicted the obligation of impartiality by involving the Sejm, a branch of government, and so one safeguard of democracy was dismantled. The reforms also compromised the separation of powers, required under Section A(2)(ii) of the Checklist. This obligation determines that a clear delineation of powers between different authorities is needed to protect the Rule of Law.<sup>38</sup> Involving the executive clearly violated this recommendation, and we will see that a compromising of the separation of powers is a common theme with PiS' reforms as they have increasingly exerted their influence over the judiciary in many areas.

As a consequence of the reforms 100 judges were forced to retire prematurely whilst their PiS supporting counterparts remained in office. In 2019 a case brought by three judges affected by the reforms came before the Court of Justice of the EU ('CJEU'). The CJEU established that where a court (in question, the Supreme Court of Poland) is subject to direct influence by the legislature or executive, or where doubts have emerged as to its neutrality, it may cease to be seen as independent or impartial.<sup>39</sup> This is a threat to the Rule of Law, one which the CJEU sought to rectify by determining the reforms to be illegitimate.<sup>40</sup> PiS was forced to reinstate those that it had culled. The EU and CoE shouldn't be confused as institutions, with one holding more legal power over its members than the other, and with a ruling in the CJEU not being applicable to any CoE treaties. However, the idea of the Rule of Law between them is comparable, and an analysis of the judgement useful, as it shows that Poland breached its obligations to the Rule of Law under EU legislation, and thus provides evidence of its deviation from equivalent CoE guidelines.

PiS were not deterred by the CJEU's decision, and in 2019 issued new reforms for the judicial sector. One of the reforms in this bill allowed the government to investigate judges and issue disciplinary measures for their

<sup>32</sup> *ibid* para 74

<sup>33</sup> *ibid* para 44

<sup>34</sup> Alistair Walsh, 'What are Poland's controversial judicial reforms?' (Dw.com, 5 November 2019) <<https://www.dw.com/en/what-are-polands-controversial-judicial-reforms/a-51121696>> accessed 5 January 2021

<sup>35</sup> Venice Commission (no 29) para 74

<sup>36</sup> Panagiotis Zinonos, 'The independence of the disciplinary chamber of the Polish Supreme Court or how to forget about discipline' (European Law Blog, 2 December 2019) <<https://europeanlawblog.eu/2019/12/02/the-independence-of-the-disciplinary-chamber-of-the-polish-supreme-court-or-how-to-forget-about-discipline/>> accessed 5 January 2021

<sup>37</sup> Venice Commission (no 29) para 81

<sup>38</sup> *ibid.* para 45

<sup>39</sup> Joined Cases C585/18 A.K. v Krajowa Rada Sądownictwa and C624/18 and C625/18 CP and DO v Sąd Najwyższy [2019] C- 27/6, Opinion of Advocate General Tanchev, para 171

<sup>40</sup> *ibid* para 157

court rulings;<sup>41</sup> Supreme Court judges could be punished for refusing to apply a domestic act if they perceive it be non-compliant with the Constitution, or International Law, if the conflict had not already been confirmed by the Constitutional Tribunal (also known as the Constitutional Court). In the bill PiS gave primacy for assessing such conflicts to the Tribunal exclusively, taking the power away from the Supreme Court. This would have been inconsequential had the Tribunal not already been subject to political influence. The Law and Justice party has infringed on the apolitical choosing of judges to the Tribunal on two occasions. The first instance, in 2015, was the December Judges scandal; President Duda refused to swear in five new judges to the Constitutional Court ('The Court' or 'The Tribunal') that had been nominated and appointed by the previous outgoing legislature before the 2015 elections, and instead swore in judges from his own party. The Sejm then amended the law on the Court, allowing them to officially annul the old judges and select new candidates. The Court themselves ruled on the issue, deeming some of the new candidates constitutional and others unconstitutional.<sup>42</sup> More complex legal dramatics followed, resulting in the Prime Minister refusing to officially publish the Court's decisions, and the Venice Commission determining that this, and other laws passed restricting the Court, threatened the Rule of Law.<sup>43</sup> Following this same pattern, in 2019 two of the new judges appointed by the Sejm to the Court had political histories, having previously been lawmakers for PiS.<sup>44</sup> All of these issues compiled have resulted in a previously independent body crucial to safeguarding the Rule of Law being replaced with a largely partisan group of judges with supreme power over whether conflicts exist in the law being passed by the party who exercises influence over them. These decisions have had an effect on the whole judicial network due to the powerful position of the Court; judges in all courts are bound to its decisions and so are subject to some 'trickle-down' or even direct political influence.

Returning to the Venice Commission's Rule of Law Checklist allows us to pinpoint specifically worded obligations that are being breached in this scenario. In the section on Constitutional Justice (section E(2)) the Commission highlights the need for access to the Tribunal not to be confined to the legislature or executive but to also be available to individuals through the courts.<sup>45</sup> As the Tribunal now has exclusive jurisdiction over determining the constitutionality of new laws, and judges who question such constitutionality can be officially punished, this pathway has been erased. Additionally, the Commission advises that the appointment of judges should not be based on political or personal considerations.<sup>46</sup> In neglecting to appoint the previous government's nominees in 2015, and the appointment of ex-PiS lawmakers to the tribunal in 2019, PiS are disregarding this aspect of safeguarding the Rule of Law. Section A of the checklist supports this determination. We can see that the Prime Minister's interference with the Court amounts to a breach of section A(2) as the section stresses the importance of the government and executive acting within their conferred powers, respecting substantive law, and there being a clear separation between authorities.<sup>47</sup> The executive influence conferred on the judiciary blurred the lines between the two powers, and PiS' interference with the selection of judges was an overstepping of its conferred powers. The Venice Commission issued an opinion on this issue, determining that the government's actions threatened the independence of the judiciary, and were an obvious attempt to control the decisions of the Tribunal.<sup>48</sup>

The issues with the bill are furthered by the sanctions set out for the new offence. They are severe and include transferring a judge, if found guilty, to another position or removing them from the profession in totality. These types of sanctions are warned against by the Venice Commission, which states that 'non-consensual transfer of judges to another court', while sometimes lawful, 'could also be used as a kind of politically motivated tool,'

<sup>41</sup> Mariusz Jałoszewski, 'PiS' night-time attack on the independence of the courts in Poland and on the CJEU judgment. The new bill, point by point' (Rule of Law, 13 December 2019) <<https://ruleoflaw.pl/pis-night-time-attack-on-the-independence-of-the-courts-in-poland-and-on-the-cjeu-judgment-the-new-bill-point-by-point/>> accessed 10 January 2021

<sup>42</sup> Committee on Legal Affairs and Human Rights (no 28) section B(4.1)

<sup>43</sup> Committee on Legal Affairs and Human Rights (no 28) section B(4.1)

<sup>44</sup> DW, 'Poland elects controversial judges to constitutional court' (Dw.com, 22 November 2019) <<https://p.dw.com/p/3TZRL>> accessed 5 January 2021

<sup>45</sup> Venice Commission (no 29) para 99

<sup>46</sup> *ibid* para 79

<sup>47</sup> *ibid* para 45

<sup>48</sup> European Commission for Democracy Through Law (Venice Commission), 'Poland Opinion on the Act on the Constitutional Tribunal' (14 October 2016) CDL-AD(2016)026

and is only really justified in ‘cases of legitimate institutional reorganisation’.<sup>49</sup> The sanctions Law and Justice are imposing are not in furtherance of any legitimate reorganisation, but are instead implemented on a case-by-case basis by a tribunal subject to the power of the executive. It is safe to determine that this does not fall into the exception highlighted, and so amounts to another threat to the Rule of Law. The offence and the punishment attached serve to create an atmosphere of censorship and control of the judiciary since judges can no longer make decisions based on the law in front of them, but have to consider what the implications of their actions will be to themselves and their career. The Rule of Law is not being safeguarded if those tasked to defend it have to work in an atmosphere of fear and political oversight.

Other reforms in the 2019 bill included the creation of a new Chamber of Extraordinary Control and Public Affairs, which was given the task of trying cases regarding the impartiality of judges. The bill gave the chamber sovereignty over this issue, making it the only chamber allowed to receive such complaints. It replaced the old Chambers of the Supreme Court and its decisions are binding on the other chambers of the court, but conversely it is not bound by them.<sup>50</sup> This is significant because it means there is no oversight of their actions and rulings and so no checks and balances to ensure that their decisions are adhering to the Rule of Law. Given the large amount of power given to them by the bill, there is great potential for an abuse of the system that will have a knock-on effect for the whole of the judiciary. Interestingly, the chamber is not allowed to evaluate motions to remove judges based on the illegality of their appointment. This move was made to prevent challenges to the judges appointed by Law and Justice to the Constitutional Court and NCJ, and so the mandate of this body is skewed in favour of PiS.

Another part of the 2019 Bill requires Polish judges to disclose their associations: what organisations they belong to; what political associations they had before becoming judges; even what websites they have accounts on in their professional capacity and personally. All of this allows Law and Justice to monitor everything that is said and done, and to pinpoint any adversaries to their regime.<sup>51</sup> The government is aware which judges are critical of their policies and can target them accordingly; the information allows PiS to undermine the impartiality of the judges, and the chambers and tribunals now under the government’s influence can be used to repress them. The Rule of Law Checklist consistently advocates against political and governmental influence over the judiciary and in the lives of judges<sup>52</sup> and so this measure amounts to another demonstrating the conscious transgression from CoE obligations that the government is undertaking.

In 2019, the Commissioner for Human Rights of the Council of Europe, Dunja Mijatović, visited Poland on a request from the Sejm and issued a report on the state of Poland in terms of its core CoE obligations to the Rule of Law, Democracy, and Human Rights. She discusses the issues of the independence of the judiciary in Poland at length in her report, chronicling their various undertakings that we have previously discussed.<sup>53</sup> Her visit took place before the appointment of PiS lawmakers to the Constitutional Court and the 2019 bill however, both of which occurred in December whilst the Commissioner’s visit had taken place several months before. Even without this updated insight, the report shows concern about the decreased amounts of cases being referred to the Constitutional Tribunal, and recommends that they should be independent.<sup>54</sup> Mijatović states that the reforms regarding retirement ages of judges violated requirements for judicial independence, confirming what was previously inferred from the Rule of Law Checklist. Importantly the report also highlights how the government slanders the judiciary and depicts them in a negative light in order to push their agenda for reform, specifically through government-funded campaigns.<sup>55</sup> This information builds upon previous scepticism about PiS’ commitment to the Rule of Law, and is a demonstration of them ‘demonising the other’ in order to enact the change they want. PiS drew on fears of liberal judges threatening traditional values to invalidate their authority and achieve support for their repression.

In January 2020 the Commissioner wrote a letter to the Polish Senate, now with the awareness of the December

<sup>49</sup> Venice Commission, Rule of Law Checklist (no 29) para 80

<sup>50</sup> Jałoszewski (no 39)

<sup>51</sup> Jałoszewski (no 39)

<sup>52</sup> Venice Commission, Rule of Law Checklist (no 29) para 74, 86

<sup>53</sup> Commissioner for Human Rights of the Council of Europe, ‘Report Following Her Visit to Poland from 11 to 15 March 2019’ (2019 Report) (28 June 2019) CommDH(2019)17

<sup>54</sup> Commissioner for Human Rights of the Council of Europe (no 51) para 10

<sup>55</sup> *ibid* 1

2019 Bill that was still going through the process of becoming law at the time. The letter was addressed to the Senate, who has limited veto power over legislation before it goes to the Sejm. The CoE Commissioner urged the Senate to reject the bill, stating that the effect of the changes was 'highly problematic from the standpoint of the standard of the Council of Europe' and it would be a further increase of the 'powers of the executive over Poland's judiciary'.<sup>56</sup> Whilst the Senate rejected the bill the Sejm later passed it, entering it into law. Therefore, as it stands, the Polish judiciary is effectively subordinated to the powers of the executive on a multitude of levels, and no attention is paid to the advice from the CoE designed to prevent this from happening.

In 2020 the Parliamentary Assembly for the CoE voted to open a monitoring procedure for Poland. A report, Resolution 2316 on 'The Functioning of Democratic Institutions in Poland', was consequently published. Within it the Assembly set out two 'litmus tests' to test the strength of democracy and The Rule of Law. Firstly the state should enact reforms that are consistent with CoE norms and values to strengthen the judicial system and Rule of Law, 'and not weaken or undermine them'.<sup>57</sup> Secondly, states should not make changes that would bring 'the judiciary under the control of the executive or legislature' and instead ensure the separation of powers.<sup>58</sup> It is needless to say that Poland under PiS has done specifically the opposite of this, and thus fails the Assembly's test. The report sums up these derogations concisely and 'expresses its serious concern about the fact that these reforms in numerous aspects run counter to European norms and standards. They cumulatively undermine and severely damage the independence of the judiciary and the Rule of Law in Poland'.<sup>59</sup>

Covering all of PiS' reforms has demonstrated how comprehensive the government has been in their attack on the judiciary and the Rule of Law. Key to an authoritarian overhaul of the state is the removal of checks and balances on the government. Comparisons to Hungary can once again be drawn; Gabor Halmai states that the Hungarian government packed their Constitutional Court with members loyal to the government, reduced competencies of the court, and lowered the retirement age of judges, all in an effort to bring the judicial sector under the executive's control.<sup>60</sup> The Orbán government was successful, and so was President Duda, who pioneered similar reforms with an equally effective outcome. The result has been a destruction of the institution capable of preventing PiS from making any unconstitutional reforms that violate its international obligations. It is also signalled to the world that Poland does not care for its international obligations to the Council of Europe, and does not appear concerned that the major regressions it is making is alienating it from the community of states and their values.

As of April 2021, the government has started to make use of its hard work; Poland's Human Rights Ombudsman Adam Bodnar has been given three months left in office, without a replacement elected to succeed him. For around half a year, the Sejm and Senate had not been able to agree on his replacement as the Sejm is controlled by PiS, and the Senate by the opposition.<sup>61</sup> Normally in situations such as this, legislation provides that the current Ombudsman remains in office until the issue is resolved. However, The Constitutional Court ruled this legislation unconstitutional and retained that a compromise was allowing Bodnar three months left in office.<sup>62</sup> Bodnar, as a protector of human rights in Poland, stood in the way of PiS dismantling the guarantees of fundamental rights that exist in the state. PiS was able to force this change as it had set up effective control over the Court, all they had to do was pull the right strings. This once again outraged the international community,<sup>63</sup> and has shown that the government are not stopping at attacking the Rule of Law; their next target is human rights.

<sup>56</sup> Letter from Dunja Mijatović to Tomasz Grodzki (9 January 2020)

<sup>57</sup> Parliamentary Assembly of the Council of Europe, 'The Functioning of Democratic Institutions in Poland' (28 January 2020) Resolution 2316 para 2

<sup>58</sup> *ibid* para 3

<sup>59</sup> *ibid* para 4

<sup>60</sup> Halmai (no 8)

<sup>61</sup> Eszter Zalan, 'Polish Court Pushes out Critical Ombudsman' EU Observer (Brussels, 16 April 2021) <<https://euobserver.com/democracy/151564>> accessed 10 May 2021

<sup>62</sup> Wyrok [judgment] TK [Constitutional Tribunal] z [of] April. 15, 2021, K 20/20

<sup>63</sup> Dunja Mijatovic (@ComissionerHR), 'Today's Constitutional Court ruling creates a worrying gap in the functioning of the Ombudsman institution in-btw terms and the protection of #humanrights in #Poland. A successor must urgently be selected fully respecting the Polish Constitution and law & international standards.' (15 April 2021) < <https://twitter.com/CommissionerHR/status/1382604164006604808>> accessed 10 May 2021



## Human Rights: Women's Rights and Abortion

This section will look at some of the challenges that the government has been able to make to human rights now that the judiciary are either under their thumb, or repressed by institutions that are meant to safeguard them. Once again the regression from core CoE values results from PiS' populist agenda. The 'us' against 'them' rhetoric encourages the targeting of particular groups in an effort to eliminate perceived threats to the Polish state. For example, PiS has displayed strong anti-migrant rhetoric, with the leak of a draft policy in 2019 showing they intend to follow a policy of assimilation whereby migrants are encouraged to assimilate to Polish culture, religion, and values.<sup>64</sup> They have also allowed and encouraged the emergence of LGBTQ 'free zones', with 100 towns declaring themselves as such, as well as employing the rhetoric that LGBT rights are 'even more destructive than communism'.<sup>65</sup> The populist technique of demonising the other is being used to threaten people's human rights in many areas, but this far-reaching threat will be explored through the recent reformation of abortion laws in Poland, a move that, along with other reforms and attitudes, serves to threaten the fundamental rights of Polish women. Not only do the reforms contradict the CoE's core values, but also the rights under the European Convention on Human Rights, as well as Poland's own Constitution.

The recent war being waged against women through the restriction of their rights and agency over their bodies is being conducted through a further restriction of already conservative laws. The laws on abortion were created in 1993 under 'The Family Planning Human Embryo Protection and Conditions of Permissibility of Abortion' Act, and were subject to a controversial reformation in 2020. Under the original 1993 act, article 4(a) allowed the termination of pregnancy in three exceptional cases: where the pregnancy threatens a mother's life; where it is a result of an unlawful act; where there is a high probability of a severe or irreversible foetal defect.<sup>66</sup> Dunja Mijatović covered the act in her 2019 report where she referenced the fact that past CoE Commissioners had regularly condemned the laws on abortion as being restrictive and a risk to women's health, and criticised that they had not progressed since then, remaining some of the most restrictive in Europe.<sup>67</sup>

The harsh laws were complemented by a decision of Poland's Constitutional Tribunal in case K 12/14 in 2015 that deemed that the obligation on doctors to perform abortions in emergency circumstances and help patients find alternative options, if they objected to performing it themselves on religious grounds, was unconstitutional.<sup>68</sup> Previously doctors had the right to object to performing abortions by invoking a 'conscientious clause' in the 1997 Doctor and Dentist Professions Act,<sup>69</sup> but were still legally bound to refer women to another facility who could help them. This was put in place to protect religious freedoms, as the Catholic Church in Poland was against abortion practises, but left some room for the rights of women. However, the ruling has pushed this balance out of the proverbial window. There is now a situation in Poland where access to abortion is unavailable even in permitted circumstances. In her report Mijatović references a study that estimates that, as of 2019, only 10% of Polish hospitals perform abortions and related services,<sup>70</sup> which makes it near impossible for women to seek out alternative remedies individually. This largely due to the fact that, as of 2014, 4000 doctors are estimated to have taken a 'Declaration of Faith', which demonstrates their intention to evoke the conscientious clause.<sup>71</sup> In summary, the abortion laws from 1993 are intolerably restrictive, doctors can 'opt-out' of performing abortions even in these legally permitted situations, and have no duty to help women find an alternative.

In 2020 the CoE Commissioner issued a Rule 9 Submission exploring three cases that had previously come before the European Court of Human Rights regarding these issues. Each case represented one of the three

<sup>64</sup> Konrad Pedziwiatr, 'The new Polish migration policy – false start' (Open Democracy, 19 August 2019) < <https://www.opendemocracy.net/en/can-europe-make-it/the-new-polish-migration-policy-false-start/> > accessed January 20

<sup>65</sup> Lucy Ash, 'Inside Poland's LGBT-free zones' (BBC News, 21 September 2020) <<https://www.bbc.co.uk/news/stories-54191344>> accessed 20 January 2021

<sup>66</sup> Ustawa z dnia 7 stycznia 1993 r. o planowaniu rodziny, ochronie płodu ludzkiego i warunkach dopuszczalności przerywania ciąży. [The Family Planning Human Embryo Protection and Conditions of Permissibility of Abortion Act of 1993] (Dz.U. 1993 Nr 17 Poz. 78) article 4(a)

<sup>67</sup> Commissioner for Human Rights of the Council of Europe (no 51) para 64-65

<sup>68</sup> Wyrok [judgment] TK [Constitutional Tribunal] z [of] October. 7, 2015, K 12/14 (OTK ZU 9A/2015)

<sup>69</sup> Ustawa z dnia 5 grudnia 1996 r. o zawodach lekarza i lekarza dentyisty [The Doctor and Dentist Professions Act of 1996] (Dz.U. 1997 Nr 28 Poz. 152)

<sup>70</sup> Commissioner for Human Rights of the Council of Europe (no 51) para 69

<sup>71</sup> *ibid* para 70

exceptions under the original 1993 Act: *Tysi c v. Poland* concerned the termination of pregnancy where a woman's life is at risk; *R. R. v. Poland* the malformation of the foetus; *P. and S. v. Poland* the approach of the authorities in situations of pregnancy resulting from rape.<sup>72</sup> The Court found violations of article 8 of the ECHR in all three cases and violations of article 3 in the latter two,<sup>73</sup> showing that the women had been subject to violations of respect for their private lives, and two had been subject to inhumane treatment.<sup>74</sup> This proved that the Polish law on abortion was causing violations of human rights to take place due to its restrictive nature and lack of protections, and that the Polish state was therefore complicit in allowing it to happen. The CoE Commissioner stated that the cases highlighted the importance of protecting women's sexual and reproductive health and that it was essential to member states' obligations to respect women's rights.<sup>75</sup>

The case of *P and S v Poland* was significant in terms of establishing the necessity of a legal framework for accessing abortion, and the limits of conscientious objection. The ECtHR determined that, under Polish law at the time and according to international standards, there was an obligation to provide patients with alternative avenues to accessing an abortion if a doctor conscientiously objects – the rights have to be balanced. As per the court, 'States are obliged to organise their health service system in such a way as to ensure that the effective exercise of freedom of conscience by health professionals' does not prevent patients from accessing services that 'they are entitled [to] under the applicable legislation.'<sup>76</sup> This was a significant ruling that has recently been built upon by the cases of *Grimmark v Sweden*<sup>77</sup> and *Steen v Sweden*.<sup>78</sup> In these cases the ECtHR determined that Sweden's outlawing of conscientious objection in this area was not a breach of article 9 (freedom of religion) of the ECHR. The cases were brought by two midwives who wished to assert this right as it had been denied under Swedish law. However, it was held that whilst freedom of religion is an unqualified right, the manifestation of it is not – it has to be balanced with other rights and obligations. Whilst this case would likely not have been decided the same if in relation to Polish law as, in contrast, it is very protective over the right to conscientious objection, it lends further weight to the fact that states are obligated to support women in this area. It also shows that international law is heading in a direction that is increasingly protective of abortive rights. This is where Poland again strays from its obligations to the Court. It has not adhered to the rulings of the cases brought against it, or shifted its legislation with the rulings of the court against other states. Instead, as we have seen, the Constitutional Tribunal of Poland has furthered the right of conscientious objection over abortion rights. This is directly contrary to the ruling in *P and S v Poland*, and is at odds with the ECtHR's apparent attitude as demonstrated by *Grimmark* and *Steen*. The ECtHR appears to be heading in one direction, and Poland in another. Dunja Mijatovi c advised against any further restrictions of the 1993 Act in her 2019 report. In a response to the government's previous attempt in 2016 to restrict abortion laws, she warned that any attempt to do this would put Poland further at odds 'with obligations under international human rights law'.<sup>79</sup>

In 2016 the government was not successful, but in 2020 the reforms were pushed through parliament. The Polish Constitutional Court ruled that article 4(a) paragraph 1(2) of the 1993 Act was unconstitutional as there was '[in]sufficient justification by the need to protect another value, right or constitutional freedom' to justify 'violating constitutional guarantees for human life'.<sup>80</sup> This made illegal the provision allowing women to have access to abortions on the basis of a severe and irreversible foetal defect, or illness that threatens its life. Effectively, women in Poland can now only access abortions if their life is in danger or they have been raped (or

<sup>72</sup> Commissioner for Human Rights of the Council of Europe, 'Submission by the Council of Europe Commissioner for Human Rights under Rule 9.4 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements in the cases of *Tysi c v. Poland* (application no. 5410/03, judgment of 20 March 2007); *R. R. v. Poland* (application no. 27617/04, judgment of 26 May 2011); *P. and S. v. Poland* (application no. 57375/08, judgment of 30 October 2012)' (Rule 9 Submission) (27 January 2020) CommDH(2020)3

<sup>73</sup> *ibid* para 2

<sup>74</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (ECHR) articles 8 and 3

<sup>75</sup> Commissioner for Human Rights of the Council of Europe, Rule 9 Submission (no 70) para 4

<sup>76</sup> *ibid*

<sup>77</sup> *P. and S. v Poland*, no. 57375/08 (ECtHR, 30 November 2012)

<sup>78</sup> *Grimmark v Sweden*, 43726/17 (ECtHR, 11 February 2020)

<sup>79</sup> Commissioner for Human Rights of the Council of Europe, 2019 Report (no 51) para 86

<sup>80</sup> Wyrok [judgment] TK [Constitutional Tribunal] z [of] October. 22, 2020, K 1/20 (OTK ZU A/2021)

the pregnancy is a product of incest), and have to carry to term fetuses that science has shown will not survive outside the womb. Speaking to the Independent, Anotonia Lewondowska argued that this amounts to torture of women; it 'is about forcing women to give birth to a foetus that won't survive or will be born with a severe disability for the rest of its life'.<sup>81</sup>

The Polish Constitutional Court's determination that there was no right surpassing those of the unborn in the Constitution is false. It is possible to identify several rights within it that conflict with their assumption. Article 68 states that everyone has the right to have their health protected; article 47 ensures that everyone shall have the right 'to make decisions about his personal life; article 33 provides for men and women to have equal rights in all areas of society.<sup>82</sup> Even though these provisions do not specifically reference abortion, they provide broad protections in areas of the law that relate to women's health and equality. Additionally, as discussed by the Commissioner, women's health and freedom are rights essential to Poland's international obligations. The ECHR does also not specifically contain a right to abortion but it provides some protection under articles 3 and 8. The cases discussed contained breaches of these provisions, but they were found in extreme scenarios, and so how much protection the Convention provides remains uncertain. However, as Poland is falling further behind the consensus in most CoE states, the majority of which allow an abortion 'on request',<sup>83</sup> the ECtHR may be more proactive in finding human rights violations. It usually affords a wide margin of discretion in cases involving moral arguments and traditions of states, but as Poland is so far behind consensus, it would likely fall outside of this. We will have to wait to see how the ECtHR applies the Convention to the new situation in Poland in the coming years to properly assess how much protection the Convention gives in this scenario.

In her 2020 report the CoE Commissioner identified that around 95% of abortions previously carried out in Poland were under section 1(2) of article 4(a),<sup>84</sup> the subsection now deemed illegal. Consequently, only 5% of abortions previously allowed are still allowed under the new system. Considering that before 2020 only approximately 1000 legal terminations took place a year, the number now likely to take place is staggeringly low – 'it means in practise almost all forms of abortion are banned'.<sup>85</sup> In contrast, it is estimated that approximately 10,000 to 15,000 illegal terminations take place a year in Poland, a number likely to go up after the tightening of the rules.<sup>86</sup> Many, like Mijatovic and Lewandowska, believe that the new rules simply serve to put women's lives at risk. The 2020 reforms are not only forcing women to be subject to horrific pregnancies, but are effectively forcing them to put their lives in danger to avoid this consequence. This adds another layer to Poland's disregard for its CoE obligations to women and those under the Convention. The CoE report on 'Women's sexual and reproductive health and rights in Europe', emphasises the importance of access to safe abortion services to women's health and reproductive rights, and stresses that restrictions on this access cause higher maternal mortality rates and threaten women's lives.<sup>87</sup> Poland is counted among 8 countries to have inadequate abortion legislation and support at the time of the report's publication. The law has a knock-on effect of forcing women to either give birth against their will or to seek illegal abortions. Illegal abortions can be found safely in other countries for women with the money and support, but for others dangerous methods have to be resorted to. In any situation adequate aftercare is also seldom found.<sup>88</sup>

PiS chose women's rights and abortion as a flagship issue as it fits into their 'us against them' doctrine and 'anti-gender ideology' rhetoric. It draws upon nationalist ideals and defines Polish values in opposition

<sup>81</sup> Maya Oppenheim, 'Women's rights activist charged for taking part in Polish abortion protests' (Independent, 11 February 2021) <<https://www.independent.co.uk/news/world/europe/poland-abortion-protests-marta-lempart-b1800915.html>> accessed 12 February 2021

<sup>82</sup> Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. [The Polish Constitution of 1997] sections 33, 47, 68, sec. 2 (Poland)

<sup>83</sup> Exelgyn, 'European Data' (Abortreport.eu) <<https://abort-report.eu/europe/>> accessed 12 February 2021

<sup>84</sup> Commissioner for Human Rights of the Council of Europe, Rule 9 Submission (no 70) para 14

<sup>85</sup> Karolina Wigura and Jarosław Kuisz, 'Poland's abortion ban is a cynical attempt to exploit religion by a failing leader' (Guardian, 28 October 2020) <<https://www.theguardian.com/commentisfree/2020/oct/28/poland-abortion-ban-kaczynski-catholic-church-protests>> accessed 12 February 2021

<sup>86</sup> BBC, 'Poland's tussle over abortion ban' (BBC, 6 October 2016) <<https://www.bbc.co.uk/news/world-europe-37449903>> accessed 12 February 2021

<sup>87</sup> Commissioner for Human Rights of the Council of Europe, 'Women's sexual and reproductive health and rights in Europe' Issue Paper (December 2017) section 1.6.1

<sup>88</sup> *ibid*

to the liberal European agenda. This is another demonstration of PiS effectively using populist techniques to garner support for authoritarian policies. The reforms also serve to please their conservative voters and the Catholic Church. The Church is an institution that holds a lot of power in Poland and to whom the majority of the population align with, and so it is important for the government to have a good relationship with it. The threats to the Rule of Law in Poland have also perpetuated an increasingly close relationship between church and state. This is a beneficial relationship for them both, with the church having greater influence in policy making, and allowing the government an easy justification for their policies. This is arguably a 'standard trick of the COVID-era illiberal populist'- to reach for religion in defence or as a justification.<sup>89</sup>

## Conclusion

It has been determined irrefutably that Poland is failing in its obligations to the Council of Europe on every level analysed. The executive is actively working against the judiciary to compromise its independence, effectiveness, and ability to function as it should, and it appears that PiS will be continuing down this path for the foreseeable future. Poland cannot plead ignorance to its discretion; they invited the CoE Commissioner to analyse the damage done to the Rule of Law and her report was comprehensive in highlighting every issue, of which there are many. Furthermore, the government appears set on threatening human rights. Taking the rights of women as an example, it was shown that PiS has progressively reduced women's adequate access to abortion services, vastly prioritising traditional and religious values over women's health and threatening not only their comfort and private lives, but their survival. Using abortion as a synecdoche for human rights showed that there was a clear lack of protection and adherence to rights obligations, but was also complex due to the emerging nature of the right and lack of ECtHR case law. However, it still provides evidence of PiS' derogation and a contemporary issue that was taking place in Poland as this study was being written.

Analysing the threats to both the Rule of Law and human rights highlighted connections between them that were crucial in creating a picture of what the government has done to the Polish state in recent years and how it has achieved it. PiS, as a populist party looking to dismantle Poland's safeguards to democracy, have enacted a systematic plan to achieve this whilst still keeping a proportion of the population on side. The dismantling of judicial protections have allowed PiS to exert increasingly authoritarian influence over the country, paving the way for attacks on human rights to be accepted both legislatively and judicially. For example, the reforms of the Constitutional Tribunal subjected it to increased executive influence, resulting in the extension of the conscious clause, and the new abortion restrictions.

PiS have also been successful in using the populist technique of demonising the other to destroy trust in the judicial system and sitting judges, as well as to paint certain groups and ideals as a threat to traditional Polish values. This has been effective in positioning the CoE as a threatening presence, and thus Poland's obligations to it as a danger to the state. In this way the government has managed to disguise its activities and ensure support as it presents itself as a beacon of stability and tradition in a world of chaos and change.

Analysing Poland's obligations as a member state of the Council of Europe showed how far Poland has deviated from its previous liberal democratic standing when it first joined the CoE in 1991. This also provides a bleak glimpse into what PiS' plans are for the future. Some of the attacks on CoE values discussed above happened in recent months, and so the continuing presence of the threat to both human rights and the Rule of Law shows that PiS are not done with their reformation of Poland; it is arguably that they will continue to breach their obligations and ignore what is expected of them. They have already followed many of the autocratic techniques used in Hungary, and appear to be joining it in being a miscreant CoE state. This has resulted in Poland becoming a member of the CoE in name only, failing to implement what truly makes a CoE state: adherence to Democracy, Human Rights, and the Rule of Law.

This finally begs concern about what the future holds for Poland in the Council of Europe. If the state is not adhering to its obligations then the Council has justification to penalise or expel it. We saw that the CoE Statute provides the Council with the ability to take away states voting rights, and in extreme measures, request them to leave. This scenario fits the requirements for such action as Poland has consistently violated their obligations under article 3 of the statute. The Council has consistently paid special attention to Poland,

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<sup>89</sup> Wigura and Kuisz (no 83)

with a visit from the Commissioner, endless reports, and recently the creation of a monitoring committee, all of which were discussed above. It is evident that having a state within the institution that flagrantly disregards its obligations does not reflect well on its success and its ability to hold states to the values they have signed up to. A state has never been expelled by the Council, so utilising this measure would be a historic move. For Poland it would signify the end of a relationship with western democracy and values. Somehow however, it seems like this would be of no concern to its ruling government, perhaps it would simply provide them with a more effective 'other' to justify furthering their authoritarian populist agenda.

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