A COLLECTION OF ANALYSES ON THE RULE OF LAW IN POLAND PREPARED BY EXPERTS OF THE ORDO IURIS INSTITUTE

WARSAW 2022

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ORDO IURIS INSTITUTE FOR LEGAL CULTURE

WARSAW 2022

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Publisher
Scientific publishing house
of the Ordo Iuris Institute for Legal Culture
Zielna 39, 00-108 Warsaw
www.ordoiuris.pl

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"Analysis of the law of provisions concerning the so-called sexual and reproductive rights in the Resolution of the European Parliament of November 15th, 2017 on the situation of the rule of law and democracy in Poland"

Main theses:

1. The European Parliament does not have the authority to decide or opine on ideological issues in the form of official acts such as resolutions.

2. Art. 2, 3, 4, 6 and 7 TEU indicated in the citation 1 do not constitute the legal basis for the adoption of recitals J and K and paragraphs 12 and 13 of the resolution.

3. There is no provision guaranteeing a subjective right to specific services in the field of so-called sexual and reproductive health, and in particular, there are no grounds for formulating a personal right to abortion, the right to non-prescription abortion medications, or a social right to hormonal contraception financed from public funds.

4. The European Court of Human Rights in Strasbourg has never assessed the material-law aspect of access to abortion in Poland. The object of the assessment only concerned the formal and legal matter, i.e. the effectiveness of the procedure allowing patients the possibility of having an abortion in cases permitted by law. Defining the limits of protection of conceived life is within the margin of freedom of the Member States, thus Poland may completely prohibit the killing of unborn children.

In the Resolution of the European Parliament of November 15th, 2017 on the rule of law in Poland[1], five editorial units were devoted to issues related to the so-called sexual and reproductive health: citation 32, recitals J and K, and paragraphs 12 and 13. The greatest doubts concern paragraphs 12 and 13 of the resolution, in which the European Parliament directly addresses the Polish authorities with specific arguments of ideological nature. In paragraph 12, the Parliament calls for "the rights of women and girls to be firmly defended by ensuring non-discriminatory access to free contraception and the provision of over-the-counter emergency contraception". In turn, in paragraph 13, the Parliament criticizes bills aimed at ensuring the full protection of the lives of unborn children, stating that "universal access to health care, including sexual and reproductive health care and related rights, is one of the fundamental human rights". In other words, in these two paragraphs, the European Parliament is constructing three rights: "the right to free hormonal contraception" (i.e. ordinary contraceptive pills taken before intercourse), "the right to abortion pills" (mistakenly called emergency contraception, even though they not only prevent conception after intercourse, but can also prevent implantation of a human embryo in the mother's womb and cause its death) and the "right to abortion" (i.e., to kill an unborn human being).

From the point of view of the applicable provisions of international and European law, the above Resolution raises serious doubts. Firstly, it should be noted that the European Parliament, as a body of the European Union, does not have the authority to regulate worldview matters. The exclusive, shared and ancillary powers of the European Union are exhaustively defined in Art. 3, 4 and 6 of the Treaty on the Functioning of the European Union (TFEU) and they are limited to such areas as the customs union, internal market, environment, consumer protection, energy and administrative cooperation. None of these provisions authorizes the European Union or any of its bodies, including Parliament, to take any action in the field of ideological matters. Pursuant to Art. 5 sec. 2 TEU, the European Union acts only within the limits of the powers conferred on it by the Member States in the Treaties to achieve the objectives set out in them, and any powers not conferred on the European Union in the Treaties belong to the Member States. Therefore, if none of the provisions of the TFEU or TEU directly authorize the European Union to undertake actions in the field of broadening access to abortion, early-abortion measures and hormonal contraception, then pursuant to Art. 5 sec. 2 TEU, it should be assumed that the European Union has no authority to regulate these areas in the form of acts of secondary legislation, or even to express its opinion on issues related to this area in the form of official acts such as resolutions. This is confirmed, among others, by the answer of the European Commission, in the framework of the parliamentary questions procedure, where it was stated that, "the Treaty [Treaty on European Union – ed. author] states that European Union action shall respect Member State responsibilities for the definition of their health policy and for the organization and delivery of health services and medical care. The responsibilities of the Member States shall include the management of health services and medical care and the allocation of the resources assigned to them. Considering the ethical, social and cultural dimension of abortions, it is for Member States to develop and implement their policies and legal frameworks. The Commission does not have the intention to complement national health policies in this respect" [2].

1 *European Parliament resolution of 15 November 2017 on the situation of the rule of law and democracy in Poland* (2017/2931(RSP)), hereinafter: "the Resolution", https://www.europarl.europa.eu/doceo/document/TA-8-2017-0442_EN.html?redirect, access: 15.12.2017.

2 See: http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2012-002933&language=EN, access: 14.12.2017.

Secondly, art. 2, 3, 4, 6 and 7 TEU also do not constitute legal grounds for broadening access to abortion, contraception, and abortion measures. These regulations define the values of the European Union, which include, inter alia, human dignity, democracy and human rights (Article 2), sanctions against the infringing country (Article 7), the socio-economic objectives of the Union (Article 3), the presumption of authority in favor of the Member States, and the principle of respecting the national identities of these states (Art. 4). They do not relate at all to those issues indicated in par. 12 and 13.

Third, when reading paragraph 12 and 13, in the light of recitals J and K of the resolution, one can get the impression that, in the opinion of the European Parliament, there is a relationship between widening access to abortion, contraception and emergency contraception and the protection of human rights. Recital J indicates that "according to the Charter of Fundamental Rights of the European Union[3], the European Convention on Human Rights[4] and the case law of the European Court of Human Rights[5], many human rights are related to the sexual and reproductive health of women". Conversely, recital K states that "denial of access to sexual and reproductive health services and denial of rights in this area, including safe and legal abortion, violates women's fundamental rights". At this point, the authors of the resolution suggest that access to abortion, free hormonal contraception, and over-the-counter abortion measures can be demanded on the basis of a universal human rights system. Such a suggestion has no legal basis. Neither the Charter of Fundamental Rights, the Treaties, the European Convention on Human Rights, international law, nor the Constitution of the Republic of Poland[6] guarantees the right to kill an unborn child.

On the contrary, the postulates to ensure universal access to hormonal contraception, emergency contraception, and abortion are contrary to Art. 1 and 2 of the Charter of Fundamental Rights, Art. 2 of the European Convention on Human Rights, and Art. 38 of the Polish Constitution, which protect the life of every human being at the international and national level. Abortion leads, and contraception can lead to deprivation of a legally protected human life. Moreover, bearing in mind that abortion and hormonal contraception may be associated with many complications, it should be stated that the implementation of these demands would also violate the right to respect for women's physical integrity, as guaranteed in Art. 3 of the Charter of Fundamental Rights and resulting from Art. 8 of the European Convention on Human Rights and Art. 68 sec. 1 of the Polish Constitution.

Considering the protection of the right to life contained in the European Convention on Human Rights, it is worth remembering that historically the right to life in the legal systems of the signatories of the European Convention on Human Rights in 1950 also included unborn children, and abortion was widely criminalized due to the violation of the right to life of conceived children[7]. Since then, in actual terms, the prenatal development of the child has not changed, and the knowledge about the development of life and the first moments of human development has deepened significantly.

3 *Charter of Fundamental Rights of the European Union* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012P%2FTXT; hereinafter: "The Charter".
4 *European Convention on Human Rights*, https://www.echr.coe.int/Documents/Convention_ENG.pdf, access: 14.12.2017; hereinafter: "ECHR").
5 Hereinafter: „ECtHR".
6 *Constitution of the Republic of Poland*, https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm, access: 14.12.2017, hereinafter: "the Polish Constitution"
7 G. Puppinck, *Abortion and the European Convention on Human Rights*, "Irish Journal of Legal Studies", vol. 3(2) (2013), p. 144.

Despite the clear position of science regarding the origins of life[8], the laws of the signatories to the European Convention on Human Rights regarding the abortion of an unborn child have been shaped in various ways. Consequently, the ECtHR allows the signatories to the European Convention on Human Rights, within the limits of their recognition, to define in their internal legal order the question of when the right to life begins[9]. However, the jurisprudence of the ECtHR has outlined certain limits in the freedom to recognize the right to life of people in the prenatal stage of development by states parties to the European Convention on Human Rights.

Firstly, in the case of Brüggemann and Scheuten v. The Federal Republic of Germany[10] and R. H. v. Norway[11], the ECtHR refused to exclude the unborn child from its jurisdiction and did not state that it was not a person within the meaning of the European Convention on Human Rights. In the case of Vo v. France, the Grand Chamber of the ECtHR stated that "it is neither desirable nor even possible, as things stand, for the purposes of Art. 2 of the Convention, to provide an abstract answer to the question whether an unborn child is a person, and added that it can be considered as a common view of states that the embryo / fetus belongs to the human race and should be protected in the name of human dignity"[12]. Regarding the recognition of the legal personality of a conceived but unborn child, the ECtHR clearly states that the right to life, confirmed in Art. 2 of the European Convention on Human Rights does not contain any limitations as to the temporal scope of this right in relation to the existence of a human person[13].

Secondly, if abortion of an unborn child in a given state would be legal, the statutory regulation of exceptions to the full protection of life should be consistent and take into account, in accordance with the obligations arising from the European Convention on Human Rights, different rights and freedoms of persons affected by abortion or involved in it[14]. The statutory regulation of abortion is only an exception to the law (in this case, the right to life) and does not constitute an independent right detached from the protected good, which in this case may be limited due to the balancing of other rights and freedoms. The right to life cannot also constitute the right to an abortion, even if the abortion is regulated by law. The ECtHR clearly confirmed that there is no alleged "right to abortion" under the European Convention on Human Rights. In Pretty v. The United Kingdom, it stated that "Art. 2 [of the European Convention on Human Rights - author's note] cannot, without distorting the language, be interpreted as conferring a diametrically opposite right, namely the right to death"[15], nor "Art. 8 [European Convention on Human Rights – editor's note] cannot be interpreted as entitling to an abortion"[16]. Moreover, the statutory admission of abortion in strictly defined cases does not of itself create the right to abortion. The legality of a given behavior, which additionally is an exception to the right to life, does not automatically create an absolute and autonomous right on the part of the

8 T.W. Sadler, *Langman's Medical Embryology*, 7th edition. Baltimore: Williams & Wilkins 1995, p. 3; Keith L. Moore and T.V.N. Persaud, *The Developing Human: Clinically Oriented Embryology*, 7th edition. Philadelphia: Saunders 2003, p. 2.

9 ECtHR judgement from 8 July 2004., *Vo v.* France, § 82.

10 Report of European Commission of Human Rights, *Brüggemann and Scheuten v. Federal Republic of Germany*, No. 6959/75 , 12 July 1977, § 60.

11 European Commission of Human Rights, *R.H. v. Norway*, No. 17004/90, Decision on the inadmissibility of the complaint from 19 May 1992, p. 167.

12 ECtHR judgement from 8 July 2004, *Vo vs. France*, § 84 and 85.

13 *Brüggemann and Scheuten v. Federal Republic of Germany* §59-61, Boso v. Italy.

14 Judgments of the ECtHR: 16 December 2010, *A. B. and C. v. Ireland*, No. 25579/05, § 249; of 28 November 2011, *R. R. v. Poland*, No. 27617/04, § 187; of 30 January 2013, *P. and S. v. Poland*, No. 57375/08, § 99; of September 24, 2007 Tysiąc v. Poland, No. 5410/03, § 116.

15 *Vo v France*, § 85.

16 Ibidem, § 84.

person who would like to take advantage of this exception. Consequently, the legality of such behavior does not constitute an obligation on the part of the state, which would result from the correlated right of the individual. The exception in the form of legal abortion is only a statutory way of weighing important goods from the point of view of a given society and it is not, and cannot be, from the point of view of legislation, a way to create a new law. Thus, the European Convention on Human Rights does not exclude prenatal life from the scope of protection of the European Convention on Human Rights, which includes the right to life and not the alleged "right to abortion".

Third, the claim made in recital K which alleges that, "due to the restrictive interpretation of this right [to legal and safe abortion] by Poland, the European Court of Human Rights ruled against Poland in several cases" should be absolutely dismissed. The ECtHR has never questioned the interpretation of the "right to abortion" in Poland. Only the existing procedures allowing patients to appeal against medical decisions refusing specific health services were subject to the evaluation of the ECtHR. The ECtHR in the cases of Tysiąc, R. R. and P. and S.[17] stated that prior to 2009 the patients had not been provided with effective legal instruments allowing them to challenge the decisions of doctors with whom they did not agree. On May 21st, 2009, the Act on Patient Rights and the Patient Ombudsman entered into force, which fully implemented the guidelines of the ECtHR formulated in the referenced rulings, guaranteeing each patient the right to request a second medical opinion and the right to object to a doctor's decision or opinion to the Medical Commission, a collegiate medical body at office of the Patient's Rights Ombudsman.

When considering protection of life on the basis of international law, one should first refer to the Universal Declaration of Human Rights[18], which was the first document to confirm the right to life in Art. 3, stating that "Everyone has the right to life, freedom, and security of his person". Moreover, the very preamble to the Declaration indicates that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human community is fundamental freedom, justice and peace in the world". As in the case of the European Convention on Human Rights, also in the Declaration drawn up two years earlier in 1948, there was no explicit reference to unborn children in Art. 3 of the Declaration. However, this absence did not mean that they were not protected under the provisions of the Declaration. At the time of the adoption of the Declaration, almost all countries banned killing people in the prenatal stage of development. This was also the understanding of the provision "everyone has the right to life", which was confirmed by the authors of the Declaration[19] and corresponds to the very law of interpretation of international treaties. Article 31 of the Vienna Convention on the Law of Treaties states that treaties "must be interpreted in good faith, in accordance with the ordinary meaning to be attached to the words used therein in their context and in the light of their object and purpose" [20]. The importance of the right to life for every human being was as indicated above, while the purpose and object of the Declaration has been and is unchanged – ensuring the protection of human rights, especially with regard to the weakest members of the human family.

17 Judgements cited in ref. no. 15.

18 Universal Declaration of Human Rights, https://www.un.org/en/about-us/universal-declaration-of-human-rights, access: 14.12.2017, hereinafter: "the Declaration".

19 A. Verdoodt, *Naissence et Signification de la Declaration Universelle des Droits de l'Homme*, Societe d'Etudes Morales, Sociales et Juridiques, Louvain-Paris: Edition Nauwelaerts 1964, p. 95-96.

20 Vienna Convention on the Law of Treaties 23 May 1969, https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf, access: 14.12.2017.

The next step in strengthening the protection of human rights, including the right to life, was the creation of the International Covenant on Civil and Political Rights[21], the role of which was to effectively implement the provisions of the Declaration. Art. 6 sec. 1 of the Covenant states that "Every human being has the inherent right to life. This right should be protected by law. No one can be arbitrarily taken of life". Thus, the inherent right to life inherent in every human being means that it belongs to all people, at every stage of their development and regardless of how long they are human. The inherent nature of this right means that international bodies cannot bestow or take away the inherent right to life and human dignity, but only confirm and protect it. This right results from the fact of being a human being and not from being given by an external entity. It arises with the emergence of a human being whose beginning is determined by the moment of fertilization. This is when every human being arises and begins to live.[22] From the point of view of science, it is a fully complete organism, although not yet fully mature, and also has a separate and unique genetic material. This means that Art. 6 sec. 1 of the Covenant, protecting the life of every human being, also protects it at the earliest stage of development, which is the first moment of its existence.[23] The further stages of development, despite their different names (zygote, blastocyst, embryo, fetus, infant, child, adolescent, adult, and elderly) are also subject to the same legal protection provided for in Art. 6 sec. 1 of the Covenant. The life of the person himself is subject to legal protection, not his specific stages of life. Any other interpretation would be inconsistent with the Covenant's prohibition of discrimination on the basis of birth or status. Moreover, the recognition of the right to life of the unborn child reveals the full context of Art. 6, which in sec. 5 prohibits the execution of a death sentence on a pregnant woman[24]. This provision is a consequence of the recognition of the independent status of the unborn child in relation to its mother, which was clearly confirmed in the preparatory work on the Covenant. Documents from the preparatory work on the Covenant clearly mention that the main reason why the death penalty should not be carried out on pregnant women is "to save the life of an innocent child" and "to be motivated by humanitarian considerations and take into account the interests of the unborn child"[25]. This approach reveals that Art. 6 sec. 5 of the Covenant not only protects people at the prenatal stage of development, but also recognizes their legal subjectivity as holders of human rights.

The Convention on the Rights of the Child itself is also a confirmation of the right to life understood in this way, guaranteed to every human being from the moment of conception [26]. Its preamble explicitly recognizes the right to life of the unborn child. The preamble states that, "a child, due to his physical and mental immaturity, requires special care, including appropriate legal protection, both before and after birth"[27]. In the context of the above preamble, Art. 1 of the Convention on the Rights of the Child defines a child as "any human being under the age of eighteen", not to mention that the status of a child is acquired at birth. Moreover, Art. 6 of the Convention on the Rights of the Child provides

21 International Covenant on Civil and Political Rights, https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights, access: 14.12.2017; hereinafter "the Covenant".
22 Op. cit. (ref. 8).
23 *Vo v. France* and the judgment of the Court of Justice of the European Union of 18 October 2011, *Olivier Brüstle v. Greenpeace e.V.*, C-34/10.
24 Art. 6 section 5 states: "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women".
25 Report of the Secretary General to the 10th Session of the United Nations General Assembly of July 1, 1955, A / 2929, Chapter VI, §10.
26 Convention on the Rights of the Child, https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child, access: 14.12.2017.
27 The above provision was first confirmed in the Declaration on the Rights of the Child of November 20, 1959.

that "every child has the inalienable right to life" and that "States Parties shall ensure, to the maximum extent possible, conditions for the child's life and development".

In conclusion, access to abortion, contraception and emergency contraceptive measures is not a human right guaranteed in any international treaty or in the regional human rights protection system of the Council of Europe or the European Union. Moreover, shaping the health policy of the Member States of the European Union is their exclusive power. The freedom of states in this regard was also universally reaffirmed in the Program of Action of the 1994 International Conference on Population and Development in Cairo, during which states agreed that "all measures and changes related to abortion in the healthcare system may be determined at national or local level in accordance with the national legislative process"[28].

28 United Nations Population Fund, Program of Action of the International Conference on Population and Development, paragraph 8.25.

02

"Analysis of the possibility of applying Art. 7 of the Treaty on European Union on local government resolutions declaring opposition to the LGBT ideology"

Main theses:

1. The press release of the European Commission of July 15th, 2021 indicates only the announcement that the situation regarding Poland will be examined through the lens of Art. 7 of the Treaty on European Union[29].

2. There are currently no allegations by the European Commission against Poland in the context of "LGBT free zones".

3. The Charter of Family Rights, adopted by Polish local self-governments, are documents intended to set the direction of family policy at the local level – they do not contain references to people identifying with the LGBT movement.

4. Resolutions or declarations of opposition to the "LGBT ideology" adopted by some local governments should be distinguished from the Local Government Charter of Family Rights.

5. The actions of the European Union aimed at Poland appear to be unjustified.

6. The European Commission adopts the first ever EU Strategy for LGBTIQ Equality.

29 Consolidated version of the Treaty on European Union, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M%2FTXT, access: 14.12.2017.

7. The Council of the European Union may decide to suspend certain rights arising from the application of the Treaties to a Member State that has committed a serious and persistent breach of Art. 2 of the Treaty on European Union.

8. The sanctions imposed on a Member State are not specifically mentioned in the Treaties. They may concern deprivation of the right to participate and speak in bodies, the deprivation of the possibility of filling important public posts with representatives of that Member State, or budget payments to a Member State.

9. With Art. 7 sec. 3 of the Treaty on European Union shows that it is not possible to exclude a Member State from the European Union, because then all rights resulting from the Treaties would be suspended.

Initial remarks

In September 2012, in his annual State of the European Union (hereinafter: EU) address to the European Parliament, President José Manuel Barroso said: "We need a more developed range of instruments – the choice between the soft power of political persuasion and the radical solution under Art. 7 of the Treaty is no longer sufficient". The answer to this need was to be the Communication of the European Commission to the European Parliament and the Council "A new EU framework to strengthen the rule of law" (hereinafter: the Communication). The Communication sets out a new EU Rule of Law Framework as a contribution by the Commission to strengthening the EU's ability to ensure effective and equal protection of the rule of law in all Member States.

At this point, it is necessary to emphasize the extremely important difference resulting from the document which is the Communication, and the mechanism of Art. 7 TEU. The Communication's function is to prevent, while function of the mechanism under Art. 7 TEU is to sanction.

The mechanisms set out in the Communication are therefore intended to address future threats to the rule of law in the Member States, before the conditions for activating the mechanisms provided for in Art. 7 TEU) are met.

The assumptions of the Commission Communication and its activities in this area were, in fact, unfounded. The Communication underlines that "The Commission is the guardian of the Treaties and has the responsibility of ensuring the respect of the values on which the EU is founded and of protecting the general interest of the Union. It must therefore play an active role in this respect"[30].

It was the beginning of the unilateral expansion of powers by the EU bodies which, ignoring the treaties, started limiting sovereignty and the possibility of creating their own law by the member states.

30 Communication from the Commission to the European Parliament and the Council a new EU Framework to strengthen the Rule of Law https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52014DC0158, access: 14.12.2017, p. 2.

On December 20th, 2017, a new stage of the procedure for monitoring the state of the rule of law in the Member States began, which opened the door to further accusations against Poland, including accusations relating in particular to democracy and human rights.

This analysis aims to present the legal aspects related to the rule of law review procedure and the use of Art. 7 of TEU on resolutions declaring opposition to LGBT ideology. The author will attempt to assess the effectiveness of the mechanisms applied by the European Union and their legality.

1. "Yellow card for Poland"

In the official press release of the European Commission of July 15th, 2021, "LGBTIQ rights: a yellow card for Poland and Hungary"[31] , it was indicated that the Commission was launching infringement proceedings against Hungary and Poland for failure to fulfill obligations related to equality and protection of fundamental rights.

In the case of Hungary, as presented in the press release, the cases concern a recently passed law, which in particular prohibits or restricts access by persons under 18 to content that promotes and presents the so-called discrepancy in relation to the identity corresponding to gender at birth, gender change or homosexuality and introduces the obligation to place a special annotation on children's books with LGBTIQ content. Concern for the European Union by the Hungarian law on stronger action against pedophiles and the amendment of individual laws to protect children (*A pedofil bűnelkövetőkkel szembeni szigorúbb fellépésről, valamint a gyermekek védelme érdekében egyes törvények módosításáról*). Pursuant to Art. 24 sec. 2 of the EU Charter of Fundamental Rights, the child's best interests must be a primary consideration in all actions relating to children, whether taken by public authorities or private institutions. Hungary acts for the benefit and on behalf of the weakest EU citizens, in accordance with the rules prevailing in the Union, hence it should be assessed that there are no grounds for accusing a Member State of violating Art. 2 of the Treaty.

However, Poland was accused of not violating Art. 2 of the Treaty on European Union, but obstruction in the exercise of Commission's powers conferred on it by the Treaties as well as violation of the principle of sincere cooperation under Art. 4 sec. 3 TEU, which requires the Member States to truly cooperate with the institutions of the European Union[32]. The Commission indicated that in order to complete its assessment it "needed adequate and comprehensive information from the Polish authorities". The communication also stated that, "despite the express request issued by the Commission in February, the Polish authorities have so far failed to provide the requested information, clearly avoiding responding to most requests from the Commission". Therefore, the Commission decided to send a letter of formal notice to Poland for non-cooperation. The Commission considers that the Polish authorities did not fully and adequately respond to the Commission's inquiry regarding the

31 *LGBTIQ rights: "yellow card" for Poland and Hungary*, https://poland.representation.ec.europa.eu/news/prawa-osob-lgbtiq-zolta-kartka-dla-polski-i-wegier-2021-07-15_pl?etrans=en access: 15.07.2021.

32 Art. 4 section 3 of the TEU states that, "Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objective".

nature and impact of the resolutions on the so-called LGBT-free zones adopted by several Polish regions and communes. Both Member States were granted two months to reply to the concerns raised by the Commission. Otherwise, the Commission may decide to send them a reasoned opinion and then refer the cases to the Court of Justice of the European Union. The actions of the Union in the above scope appear to be unjustified.

The indicated press release stated that from 2019, several Polish municipalities and regions adopted resolutions on the creation of the so-called LGBT-free zones. The Commission was concerned that **these statements could breach European Union law on non-discrimination on the basis of sexual orientation**. It was also added that a detailed analysis of the compliance of the abovementioned resolutions with EU law should be carried out.

The government plenipotentiary for equal treatment, Anna Schmidt, responded to the accusations made against Poland, pointing out that, "the European Commission issued a letter on the resolutions to which we responded within the indicated deadline, i.e. in April 2021. We are also in contact with the European Commission on this matter"[33].

At this point, we should mention the response of July 8th, 2021 given by Commissioner Helena Dalli on behalf of the European Commission to the questions (E-001382/2021[34]) contained in the document of March 11th, 2021[35] Helena Dalia stated that, "The Commission is aware of the concerns expressed in a complaint about 'LGBT-free zones' in Poland, submitted by ILGA-Europe, Campaign Against Homophobia and the Equality Foundation. In order to accurately assess the situation in Poland in the light of EU law, **the Commission entered into a dialogue with the Polish authorities. The Commission is currently assessing the response of the Polish authorities**. Based on the results of this assessment, the Commission will decide on the next steps, including the possibility of launching an infringement procedure"[36].

The above indicates that Poland is not obstructing the work of the Commission and has indeed responded to the inquiries submitted by the Commission.

It is also puzzling that the communication merely announced that an examination of the situation concerning Poland will be performed, stating that, "a detailed analysis should be carried out". There are currently no charges against Poland in the context of the so-called "LGBT free zones". As already indicated above, the procedure should only be launched when it becomes known that in a given Member State there are "clear indications" of a systemic threat to the values referred to in Article 2.

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33 *The European Commission initiates proceedings regarding LGBT-free zones. "We are in touch on this matter"*, Dziennik Gazeta Prawna, https://www.gazetaprawna.pl/wiadomosci/swiat/artykuly/8210074,ke-polska-strefa-wolna-od-lgbt-prawo-ue-homoseksualisci.html, access: 09.08.2021.

34 Questions included in the letter to the EC:
1. At what stage of assessment is the complaint submitted by ILGA-Europe, Kampania Przeciw Homofobii and Fundacja Równość?
2. Which Commission Directorate-General is responsible for evaluating the complaints about the so-called LGBT-free zones?
3. Is the Commission planning to initiate an infringement procedure against Poland on the basis of the complaints? If not, what is holding it back?

35 Question for written answer E-001382/2021 to the Commission, https://www.europarl.europa.eu/doceo/document/E-9-2021-001382_EN.html, access. 09.08.2021.

36 Answer given by Ms Dalli on behalf of the European Commission, ref. E-001382/2021, https://www.europarl.europa.eu/doceo/document/E-9-2021-001382-ASW_EN.html, access. 09.08.2021.

It should be noted that already in the Resolution of the European Parliament of September 17th, 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, Parliament argued that the reasoned Commission proposal of December 20th, 2017 submitted in accordance with Art. 7 sec. 1 TEU regarding the rule of law in Poland: limited in scope, i.e. the rule of law in Poland in the strict sense of the independence of the judiciary, and sees an urgent need to extend the scope of the reasoned proposal by **taking into account the clear risk of a serious breach of other fundamental values of the Union, especially democracy and human rights**[37].

The resolution calls on the Council and the Commission not to apply a narrow interpretation of the rule of law and to fully use the potential of the procedure provided for in Art. 7 sec. 1 TEU, dealing with the consequences of the actions of the Polish government for all the principles set out in Art. 2 TEU, including democracy and fundamental rights.

The above position allows us to assume that the European Union will seek the possibility of punishing Poland even in the absence of legal grounds. It should be recalled that Poland has already suffered the consequences of the allegations regarding "LGBT zones" and six applications for funds for projects under the EU program "Town twinning" have been rejected. Their submission was to involve Polish local authorities, which adopted resolutions on "LGBTI free zones" or "family rights". Helena Dali said that, "Member States and state authorities must respect EU values and fundamental rights. Therefore, six town twinning applications involving Polish authorities and adopting resolutions on LGBTI-free zones or family rights were rejected"[38].

The European Commission is stepping up efforts to promote the Union of Equality for All and is adopting the first ever EU Strategy for LGBTIQ Equality 2020-2025. In the presented Strategy, the Commission announced the fight against discrimination against the LGBTIQ community in all areas of EU policy. The strategy sets out a series of goals to be achieved by 2025, broken down into four pillars: combating discrimination against the LGBTIQ community, ensuring the safety of the LGBTIQ community, advocating for LGBTIQ equality worldwide (increasing the EU's commitment to LGBTIQ equality in all international relations), building societies inclusive for LGBTIQ[39]. The strategy adopted by the European Commission may intensify the finding of discrimination against the LGBTIQ community in Poland and the accusation of further unconfirmed accusations.

2. "LGBT-free" zones

From March 2019 to March 2020, 55 legislative bodies of local government units in Poland adopted declarations of opposition to LGBT ideology, to the LGBT + declaration, or to gender ideology. These declarations should be clearly distinguished from the Local Government Charter of Family Rights,

37 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 (COM(2017)0835 — 2017/0360R(NLE)).

38 *Polish cities will not get money because of the „LGBTI free zones,* TVP Info, https://www.tvp.info/49170578/unia-europejska-odrzucila-wnioski-o-srodki-dla-polskich-miast-powodem-strefy-wolne-od-lgbti-wieszwiecej, access: 09.08.2021.

39 The EU Gender Equality Strategy, https://ec.europa.eu/info/sites/default/files/aid_development_cooperation_fundamental_rights/gender_equality_strategy_factsheet_en.pdf, access: 09.08.2021.

which from April 2019 to June 2020 was adopted by 38 legislative bodies of local government units. These are two types of documents with completely different contents and form.

The Local Government Charter of Family Rights is not an act of local law. Pursuant to the judicature of the Supreme Administrative Court, the local legislative body is authorized to "take non-regulatory actions, e.g. of a programmatic or intentional nature, as long as these actions remain within the limits of the tasks of municipalities provided for in the law"[40]. The Local Government Charter of Family Rights does not create specific norms, limiting itself to indicating to the self-government executive authorities the areas in which they are obliged to act already by the provisions of the Constitution and statutes. The Supreme Administrative Court, in its judgment of September 19th, 2017 (file reference number II GSK 3514/15), indicated that, "the so-called the directional resolution may indicate the priorities which the executive body should follow when implementing the resolution". There is no mention of the LGBT movement in this document. The Local Government Charter of Family Rights should be read as the implementation of the obligation to provide special protection of the family under Art. 18 of the Polish Constitution and confirmation of elementary human rights, such as the rights of parents, the impartiality of the ideological school and freedom of speech. Nothing in the discussed document changes the legal situation of people living together in relationships other than marriage.

Apart from local governments that have adopted the Local Government Charter of Family Rights, there are local governments that have taken positions that oppose the promotion of LGBT ideology, the goals of which "violate fundamental rights and freedoms, guaranteed by acts of international law, question the values protected in the Polish Constitution, and interfere with the autonomy of religious communities"[41].

The cardinal issue in this analysis is that the resolutions in question did not establish "LGBT-free zones". The authors of the declaration emphasize that the self-government they represent "will not interfere in the private sphere of the life of Polish families", and the resolution is adopted in connection with the ideological war, caused by some politicians, identified by the project initiator. In this case, there is no criticism in the documents of all people with preferences other than heterosexual, but only about a specific group of people identified not because of their personal characteristics, but their external involvement of a political or ideological nature. These groups, in the opinion of the authors of the resolutions, "attack the freedom of speech, the innocence of children, the authority of the family and school, and the freedom of entrepreneurs". These are values protected by the Polish constitutional order and should also be protected by European treaties.

It should be noted that the information about the so-called LGBT-free zones was a lie, widely disseminated in the media. On November 26th, 2019, at the seat of the European Parliament in Strasbourg, under the patronage of the European United Left Eurogroup, a press conference was held, during which the left-wing activist Kamil Maczuga presented a map entitled "Atlas of Hate", which marked all Polish local governments that adopted one-off declarations of opposition to ideology "LGBT"

40 Judgment of the Supreme Administrative Court of February 1, 2017, file ref. no. I OSK 2779/16.
41 Decision of the Provincial Administrative Court in Lublin of February 17, 2021, III SA / Lu 240/20.

and those that adopted the Local Government Charter of Family Rights. The map was accompanied by a comment that incorrectly stated that these resolutions constituted "LGBT-free zones". The Supreme Administrative Court indicated in its jurisprudence that in the light of Art. 54 sec. 1 of the Constitution, talks about the freedom of every person, and thus also a member of a self-governing community, to express their views, it is impossible to deny or limit this freedom to the organs of the community. (...) The deprivation of the voice of these organs in the public discourse (...) is therefore also a violation of the freedom of expression enjoyed by all residents"[42]. The Provincial Administrative Court in Kielce, by a decision of September 30th, 2019, stated that, "a resolution of the voivodeship council containing a declaration of an ideological and philosophical nature, consistent with the views of the majority of councilors, may not be subject to administrative court control, as long as it does not concern the presentation of ideology, which is prohibited by law and does not interfere with the public law sphere by sending an order of binding action to other entities or as long as it does not impose obligations on citizens, does not grant rights or otherwise shape their legal situation. The challenged resolution does not contain such features"[43]. The positions taken by councilors are therefore in line with the principle of equal treatment and cannot discriminate against any people or communities.

The above indicates that the objections raised by the European Commission to the activities of Poland and local authorities in the discussed context have no factual or legal basis.

3. Article 2 of the Treaty on the European Union

The preamble to the Treaty on European Union indicates that the establishment of the European Union was inspired by "the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law"[44].

Article 2 of the Treaty expressly states that "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail". The set of the above values also includes respect for the rule of law.

The case-law of the Court of Justice of the European Union and the European Court of Human Rights does not contain a uniform definition of the "rule of law", it creates the so-called "umbrella principle" or, in other words, a meta-principle that brings together elements of independent normative significance in the EU legal system[45]. They indicate the principles that make up the rule of law, thus trying to define its basic meaning. These rules include, but are not limited to:

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42 Judgment of the Supreme Administrative Court dated April 18, 2018, file ref. no. I OSK 552/18

43 Decision of the Provincial Administrative Court in Kielce of September 30, 2019, file ref. no. II SA / Ke 650/19.

44 Consolidated version of the Treaty on European Union, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M%2FTXT, access: 09.08.2021.

45 M. Taborowski, *Mechanizmy ochrony praworządności państw członkowskich w prawie Unii Europejskiej. Studium przebudzenia systemu ponadnarodowego* [Mechanisms of protection of the rule of law of the Member States in the law of the European Union. A study of the awakening of the supranational system], Warsaw 2019, p. 61.

1. legality,
2. legal certainty,
3. separation of powers,
4. prohibition of arbitrariness of the executive powers,
5. independent and impartial courts,
6. effective judicial review including respect for fundamental rights,
7. equality before the law.[46]

According to the Communication, respect for the rule of law is inextricably linked with respect for the principles of democracy and fundamental rights: there can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa[47]. It further points out that democracy is protected if the essential role of the judiciary, including constitutional courts, can ensure freedom of expression, freedom of assembly and respect for the rules governing the political and electoral process.

The European Commission is acting as the guardian of the rule of law of the Member States. When the mechanisms established at the national level to ensure the rule of law cease to function within the limits established by the EU authorities, then there is a threat to the rule of law and thus to the functioning of the EU as an area of freedom, security, and justice without internal borders. In such situations, the EU takes action to protect the broadly understood rule of law.

In the Resolution of the European Parliament of September 17th, 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, Parliament notes that the reasoned Commission proposal of December 20th, 2017 submitted pursuant to Art. 7 sec. 1 TEU regarding the rule of law in Poland: limited in scope, i.e. the rule of law in Poland in the strict sense of the independence of the judiciary, and sees an urgent need to extend the scope of the reasoned **proposal by taking into account the clear risk of a serious breach of other fundamental values of the Union, especially democracy and human rights**[48].

The resolution calls on the Council and the Commission not to apply a narrow interpretation of the rule of law and to fully use the potential of the procedure provided for in Art. 7 sec. 1 TEU, dealing with the consequences of the actions of the Polish government for all the principles set out in Art. 2 TEU, including democracy and fundamental rights.

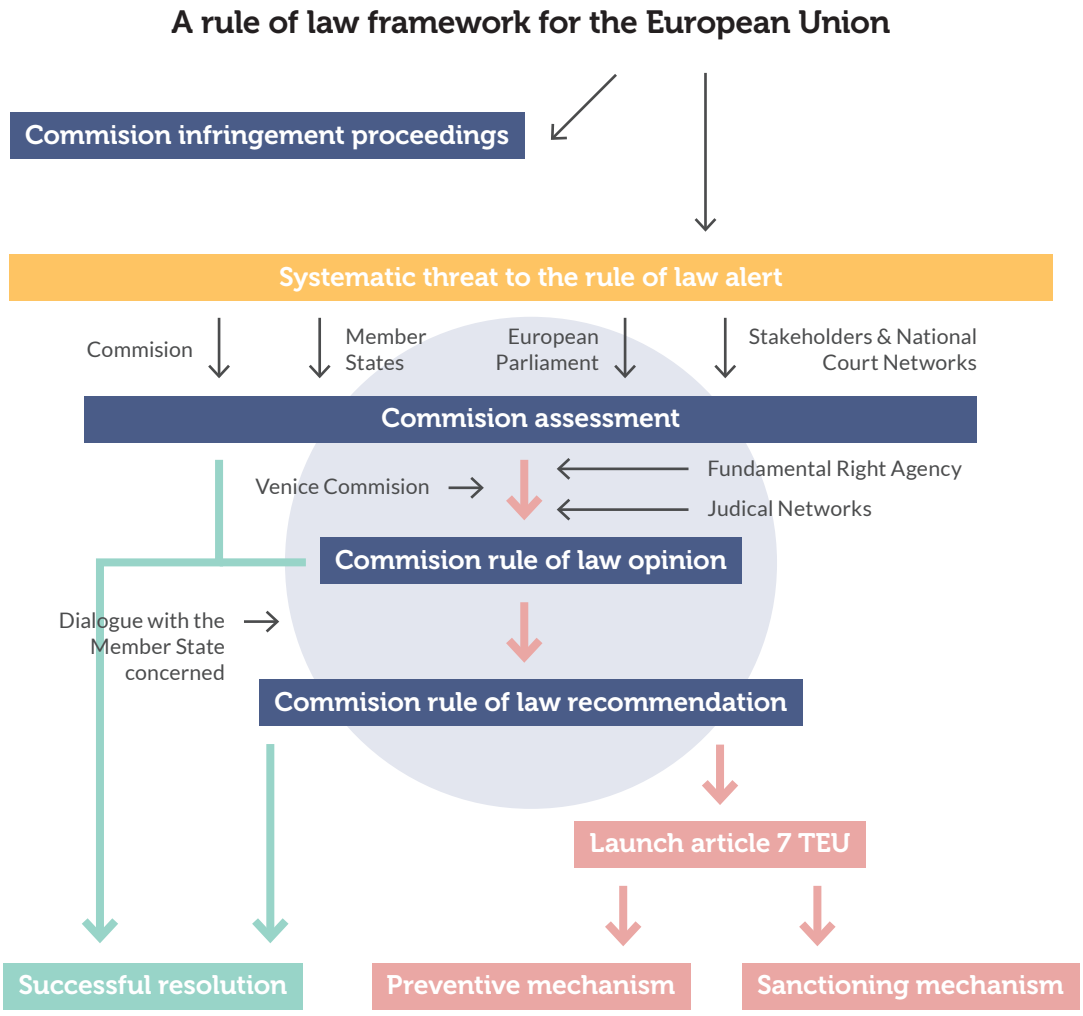
It should be emphasized that there are no grounds to indicate a violation of Art. 2 TEU by Poland through "non-cooperation" with the Commission.

Annex II to the Communication from the Commission to the European Parliament presents a diagram of activities preceding the implementation of Art. 7 TEU. It is as follows:

46 Communication from the Commission to the European Parliament and the Council – A new EU Framework to strengthen the Rule of Law, COM (2014) 158 final, Strasburg 11.03.2014, Annex I.

47 Communication, p. 4.

48 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 (COM(2017)0835 — 2017/0360R(NLE))



Source: *Communication from the Commission to the European Parliament and the Council – A new EU Framework to strengthen the Rule of Law, COM(2014) 158 final, Strasburg 11.3.2014 r., Annex II.*

As can be seen in the presented diagram, in order to apply Art. 7 of the Treaty on European Union, a series of preparatory steps must be undertaken first. The procedure itself should be launched only after receiving information that there are "clear signs" of a systemic threat to the rule of law in a given Member State.

There are three grounds for initiating the procedure in question:

1. national protective measures in the field of the rule of law seem ineffective in countering these threats,
2. other mechanisms at the Union level are not able to address the threats related to the rule of law,
3. there is a suspicion that there may be a systemic threat to the rule of law in a given Member State [49].

49 Communication, p. 5.

At this point, it should be emphasized once again that the European Union has not developed a uniform definition of the rule of law, what is and what is not lawful is to be decided by the EU bodies. This may lead to a situation where, for officials from Brussels, actions consistent with the basic law of a given country may turn out to be a "sign" of a threat to the rule of law. A similar situation applies to the interpretation of Art. 2 of the Treaty on European Union, which can be treated broadly. The solution of the marked problem requires the unification of the interpretation of Art. 2 of the Treaty, which, "would not impose a specific system of government on the Member States, but offer criteria allowing for the determination of a violation of the democratic order"[50].

4. Art. 7 TEU

In a press release from the European Commission on that day, we can read that, "for nearly two years, the Commission has repeatedly made efforts to establish a constructive dialogue with the Polish authorities in the context of the rule of law framework. Today, however, it stated that there is a clear risk of a serious breach of the rule of law in Poland"[51].

In a reasoned request pursuant to Art. 7 sec. 1 of the Treaty on European Union regarding the rule of law in Poland, the Commission's "concerns" as to respect for the rule of law in Poland were identified. At the same time, the Council was called upon to state, on the basis of the same provision, the existence of a clear risk of a serious breach by the Republic of Poland of the rule of law, which is one of the values referred to in Art. 2 TEU[52]. The Commission's concerns related to the following issues:

1. lack of an independent and lawful control of compliance with the Constitution;

2. the adoption by the Polish Parliament of new legislative provisions relating to the judicial system, which raise serious concerns as to the independence of the judiciary and significantly increase the systemic threat to the rule of law in Poland:

    a. the law on the Supreme Court adopted by the Senate on December 15, 2017.

    b. the Act amending the Act - Law on the System of Common Courts ("Act - Law on the System of Common Courts") published in the Journal of Laws on July 28th, 2017, and in force since August 12th, 2017;

    c. the Act amending the Act on the National Council of the Judiciary and certain other acts ("the Act on the National Council of the Judiciary") adopted by the Senate on December 15, 2017;

    d. the Act amending the Act on the National School of Judiciary and Public Prosecution, the Act - Law on the System of Common Courts and certain other acts ("the Act on the National

50 C. Möllers, L. Schneider, *Safeguarding Democracy in the European Union, A Study on a European Responsibility*, p. 96, https://www.boell.de/sites/default/files/boell-foundation_safeguarding-democracy-in-the-european-union.pdf?dimension1=division_euna, access: 09.08.2021.

51 Rule of Law: European Commission acts to defend judicial independence in Poland, https://ec.europa.eu/commission/presscorner/detail/en/IP_17_5367, access: 15.07.2021 r.

52 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, 20.12.2017.

School of the Judiciary") published in the Journal of Laws on June 13th, 2017 and in force since June 20, 2017.[53]

The European Council stated that there was a clear risk of a serious breach of the rule of law by the Republic of Poland. In the decision, the Republic of Poland was instructed to take the following actions, within 3 months:

a. restoring the independence and legitimacy of the Constitutional Tribunal as guarantor of the Constitution of the Republic of Poland by ensuring that the President, Vice-President, and judges of the Tribunal are lawfully elected and appointed, and by fully implementing the judgments of the Constitutional Tribunal of December 3rd and 9th, 2015, according to which the positions of judges of the Constitutional Tribunal are to be taken over by three judges legally elected by the previous Parliament in October 2015, whereas three judges elected by the Parliament for a new term of office without a valid legal basis may not adjudicate until their appointment is conducted lawfully;

b. publication and full implementation of the judgments of the Constitutional Tribunal of March 9th, 2016, August 11th, 2016 and November 7th, 2016;

c. ensuring that the Act on the Supreme Court, the Act - Law on the System of Common Courts, the Act on the National Council of the Judiciary and the Act on the National School of the Judiciary are amended to ensure their compliance with the requirements of independence of the judiciary and of judges, principle of separation of powers, and legal certainty;

d. ensuring that any reform of the judiciary is prepared in close cooperation with members of the judiciary and all interested parties, including the Venice Commission;

e. refraining from actions and public statements that infringe the legitimacy of the Constitutional Tribunal, the Supreme Court, common courts, judges, both individuals and judges in general, and the judiciary as a whole[54].

It should be pointed out that the above list is extensive and leads to far-reaching interference in the legal system of Poland, which is guaranteed by the Constitution and statutes. Compliance with the above guidelines makes it impossible to discuss the validity of the EU's accusations against Poland.

The Treaty of Amsterdam introduced a provision (later Article 7 TEU)[55], according to which the Council may find a serious and persistent breach by a Member State of the fundamental principles of the European Union. As a result of this determination, the Council could decide to suspend certain rights arising from the application of this Treaty to the Member State concerned.

53 Ibidem, p. 1-2.
54 Ibidem, p. 45.
55 Article 7 of the TEU was, in its present wording, only shaped by the Treaty of Lisbon

Pursuant to Art. 7 sec. 1 of the Treaty on European Union, on a reasoned request from one third of the Member States, the European Parliament or the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, **may find that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2**.

The mechanism presented in the provision under discussion serves to fulfill a preventive function. In order for the procedure to commence, it must be concluded that, "there is a clear risk of a serious breach of values". This wording is vague. Both "clear risk" and „serious breach" are purely subjective expressions. The doctrine of the subject assumes that a "serious violation" is one that is "of considerable gravity" or that "must be of high intensity and constitute an obvious violation of great gravity"[56]. It should be noted that the violation of "great" or "considerable gravity" is also an ambiguous expression.

Section 2 of the said provision states that the European Council, **acting unanimously at the request** of one-third of the Member States or the European Commission and after obtaining the consent of the European Parliament, may, after inviting a Member State to submit its comments, find **a serious and persistent breach of the values by that Member State referred to in Article 2**.

On December 20th, 2017, a new stage of the procedure for monitoring the state of the rule of law in the Member States began, related to the activation of the mechanism under Art. 7 sec. 1 of the Treaty on European Union.

Article 354 TFEU indicates that for the purposes of Article 7 of the Treaty on European Union concerning the suspension of certain rights deriving from membership of the Union, the member of the European Council or the Council representing the Member State concerned shall not participate in the vote, and the Member State concerned **shall not be taken into account when calculating 1/3 or 4/5 of the Member States provided for in paragraphs 1 and 2 of the said Article**.

In the light of Art. 354 TFEU, in the above-mentioned vote, the alleged violation of Art. 2 TEU Pursuant to art. 354 section 1 TFEU, abstentions of members present or represented shall not prevent the adoption of a decision[57].

At this point, however, it should be emphasized that the exceptional ties linking Hungary and Poland block the possibility of launching the recovery mechanism in relation to these countries.

Poland and Hungary will be able to block the finding of a serious and permanent violation of the values under Art. 2 TEU. At present, the European Union is unable to conduct the mechanism in question simultaneously with two Member States in a single procedure, which would exclude all these countries from voting. In the literature on the subject, there are voices that "it would be possible to initiate the procedure under Art. 7 sec. 2 TEU at the same time against a greater number of Member

56 M. Taborowski, op. cit., p. 169.

57 Art. 354 sentence 1 TFEU states that, "For the purposes of Article 7 of the Treaty on European Union on the suspension of certain rights resulting from Union membership, the member of the European Council or of the Council representing the Member State in question shall not take part in the vote and the Member State in question shall not be counted in the calculation of the one third or four fifths of Member States referred to in paragraphs 1 and 2 of that Article. Abstentions by members present in person or represented shall not prevent the adoption of decisions referred to in paragraph 2 of that Article".

States violating the values of Art. 2 TEU, which would at the same time exclude all these states from voting"[58], but there is no legal basis for such a solution.

In art. 7 (3) of the TEU, it was stated that, following the determination under Art. 7 sec. 2, the Council, acting by a qualified majority, may decide to suspend certain rights deriving from the application of the Treaties for that Member State, including the voting right of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible effects of such a suspension on the rights and obligations of natural and legal persons.

The referenced provision states that the Council of the European Union **may decide to suspend certain rights** arising from the application of the Treaties to a Member State that has committed a serious and persistent violation of Art. 2 TEU. The sanctions imposed on a Member State are not specifically mentioned in the Treaties. They may concern deprivation of the right to participate and speak in bodies, the deprivation of the possibility of filling important public positions with representatives of that Member State, or budget payments to a Member State.

The above leads to the conclusion that it is not possible to exclude a Member State from the European Union on the basis of Art. 7 sec. 3 TEU, because then all rights resulting from the Treaties would be suspended, and the sanctions must comply with the EU principle of proportionality.

58 M. Taborowski, op. cit,, p. 138.

03

"Comparative analysis of the judiciary in the Netherlands and Poland"

Main theses:

1. Apart from the assessment of the Polish reform itself, it is worth paying attention to the solutions adopted in this area in the Netherlands, especially since an equally important reform of the judiciary took place there, quite recently, in 2002.

2. The Dutch solutions seem to confirm that a profound reform of the judiciary is not only necessary but also possible, and that supporting the independence of judges is the basis of well-functioning courts.

The dispute over the changes planned by the ruling party in the Polish judiciary has involved both sides of the conflict so much in recent days that the statement of the Netherlands, the first vice-president of the European Commission, Frans Timmermans, published on July 19, after the meeting of the College of Commissioners on the threats to the independence of the judiciary, was almost unheard of in Poland.

Apart from the assessment of the Polish reform itself, it is worth paying attention to the solutions adopted in this area in the Netherlands, especially since an equally important reform of the judiciary took place there, quite recently, in 2002.

The wide-ranging reform of the judiciary in the Netherlands was a response to the need to strengthen the independence of the judiciary reported by the parliament and the judiciary, as before the reform, the Minister of Justice was responsible for the management and supervision of the judiciary. In the judicial sphere, judges in individual courts were solely liable for adjudication. The Dutch Judicial Council is designed to act as a buffer between the judiciary and the executive.

In Poland, the National Council of the Judiciary has been operating since 1989, and its existence and shape are directly determined by the constitution (Articles 186-187 of the Constitution of the

Republic of Poland). Meanwhile, in the Netherlands, a similar body was established only in 2002, while the Dutch Judicial Council (*Raad voor de Rechtspraak*) is not empowered by the provisions of the constitution.

According to the Polish Constitution, the National Council of the Judiciary consists of 25 members, including 15 judges. The amendment proposed in the act amending the act on the National Council of the Judiciary in Art. 10 sec. 1 would provide that fifteen members of the Council are elected by the Parliament from among judges of the Supreme Court, common courts, administrative courts, and military courts. Currently, the members of the Council are chosen by the judges themselves from among the circle of judges.

In the Netherlands, the Council is a much smaller body, as it has 3 to 5 members (depending on the decision of the Council itself). Pursuant to Art. 84 sec. 4 of the Act on the Organization of Courts (*Wet op de rechterlijke organisatie*), if the Council has 4 members, at least two of them must be judges. It is worth adding that the Chairman and Vice-Chairman of the Council is always a judge, and if the number of votes "for" and "against" is equal, the vote of the Chairman is decisive.

In Poland, in accordance with the proposed changes, the Chairman is chosen by the Council itself. The chairman does not have to be a judge, but for a resolution to be valid it is necessary to obtain an absolute majority of votes, with at least half of the members present.

It is worth noting that one of the most serious allegations against the proposed amendment, concerning the appointment and dismissal of judges by the Minister of Justice de facto, can also be applied to the Dutch system. Pursuant to Art. 85 of the Law on the Organization of the Courts, judges are appointed by Royal Decree at the request of the Minister for Security and Justice. It is true that the minister receives a list of recommendations from the Council earlier. It is also important that although it is accepted that the minister does not have a veto over the appointment of a person by the Council, it results only from common law and is not regulated by law. Despite being established in practice, it always leaves a discretionary power, thanks to which, even in the face of protests, a refusal to select a person recommended by the Council would constitute a *lege artis* action.

Emerging reports of the "decisive influence" of the National Selection Commission for the Judiciary (LDS) on the selection of judges in the Netherlands, due to its authority to recruit candidates to the *Studiecentrum Rechtspleging* (SSR), the equivalent of the Polish National School of Judiciary and Public Prosecution (KSSiP), they are, in fact, completely irrelevant to the assessment of the judicial appointment procedure. Completing the Dutch SSR, similarly to the KSSiP in Poland, is the basic condition for gaining access to the profession of judge.

The Dutch solutions seem to confirm that a profound reform of the judiciary is not only necessary but also possible, and that supporting the independence of judges is the basis of well-functioning courts. Looking through the prism of the statements of the Vice-President of the European Commission, Frans Timmermans, it is difficult to resist the impression that the definition of the changes proposed as part of the Polish judicial reform as an attack on the independence of the judiciary is

clearly wrong. Comparing the content of the amendment to the Act on the National Council of the Judiciary – ultimately rejected by the President of the Republic of Poland – with the solutions successfully operating in the home country of the Vice-President of the European Commission, it cannot be denied that the direction of changes set out by Law and Justice in Poland is relatively similar. One may even be tempted to say that the method of selecting judges in the proposed amendment was much more transparent than the Dutch formula based on common law, which left a dangerous decision-making gap.

04

"Memorandum on changes to the National Council of the Judiciary"

Main theses:

1. The current procedure for selecting candidates for members of the National Council of the Judiciary is more democratic than the previous one and allows for greater, albeit indirect, participation of the Sejm representing the nation in the process of appointing judges.

2. In the light of the applicable regulations, the election of 15 members-judges of the National Council of the Judiciary takes little account of the position of the judicial self-government.

1. Diagnosis of the current situation

Currently, fifteen judges – members of the National Council of the Judiciary (KRS) are elected by the Parliament from among judges of the Supreme Court, common courts, administrative courts and military courts. These members are elected for a joint four-year term of office, and when electing them, the Parliament takes into account the need to represent judges of various types and levels of courts in the National Council of the Judiciary. A judge may serve as an elected member of the National Council of the Judiciary for only two terms[59].

The entities authorized to propose a candidate for a member of the National Council of the Judiciary are a group of at least two thousand Polish citizens or twenty-five judges, excluding retired judges[60]. From among the candidates proposed in this way, each of the deputies' clubs selects a maximum of nine candidates for members of the National Council of the Judiciary. If the total number of candidates nominated by parliamentary clubs is less than fifteen, the Presidium of the Parliament shall

59 Art. 9a-10 of Act of 12 May 2011 on National Judiciary Council, Journal of Law of 2019 item 84 (Act on NJC).
60 Art. 11a para. 2 of Act on NJC.

indicate, from among the candidates previously proposed, no less than fifteen candidates. Then the relevant parliamentary committee selects fifteen candidates from among the candidates proposed by the parliamentary clubs (taking into account at least one candidate nominated by each of the parliamentary clubs). Then, the Parliament elects the members of the National Council of the Judiciary at the next sitting of the Parliament, by a majority of 3/5 votes in the presence of at least half of the statutory number of deputies, by voting for the list of candidates. If the majority of 3/5 votes is not achieved, the Sejm shall elect the members of the National Council of the Judiciary by an absolute majority of votes in the presence of at least half of the statutory number of deputies[61].

The current procedure for selecting candidates for the NCJ is more democratic than before. In particular, this is due to the introduction of the mechanism of expressing support for the candidate by citizens. Also, the introduction of parliamentary control over the election of members of the National Council of the Judiciary should be assessed positively from the point of view of the principle of the separation of powers, as an instrument of influence of the legislative power, which inevitably has the greatest democratic legitimacy, on the judiciary, due to the essence of the separation of powers not subject to formal control by organs of other powers.

The current solution, however, is somewhat controversial due to the excessive involvement of the legislature in the election of representatives of the judiciary to the National Council of the Judiciary. If a candidate receives only 25 votes of support among judges, there is a risk that the Parliament will select a candidate who has little support in the judiciary community, and therefore is not a representative candidate. An additional danger is posed by the fact that many judges are delegated to the Ministry of Justice and the votes of support for only these judges may determine the presentation of candidates related to the representative of the executive power to the Parliament. Theoretically, this should be counteracted by the candidate selection procedure by a majority of 3/5 votes, but it is an ineffective solution in this respect, because in the absence of the required qualified majority, the election is made by an absolute majority of votes, which favors the ruling party or coalition. The image of the association of judges-members of the National Council of the Judiciary with the legislative or executive authority is completed by their appointment for a joint term corresponding to the length of the term of office of the Parliament. Such a solution ensures, as a rule, influence on the election of members of the National Council of the Judiciary of the parliamentary majority in each parliamentary term.

2. Recommended solution

The method of selecting candidates for members of the NCJ is a key issue that must be reformed in order to maintain a balance between the tripartite division of powers and mutual control of the authorities.

The Sejm should elect members of the National Council of the Judiciary from among candidates proposed by the judicial self-government. The General Assembly of Judges of the Supreme Court, the General Assembly of Judges of the Supreme Administrative Court, the general assembly of judges

61 Art. 11d para. 2-6.

of each court of appeal, each regional court, each voivodship administrative court, and the Assembly of Military Court Judges would propose no more than three candidacies ranked according to the number of votes received. General assemblies of district courts, at a joint session within a district, would jointly put forward three candidatures ranked according to the number of votes received. When voting, each judge would have only one vote. During the selection of candidates, each judge could vote for any judge of his choice (without being a member of the court, to which the voting judge is appointed, but within a given grade / type). As a result, the number of candidates will be limited, and the indicated persons will at the same time have the support of the judiciary.

It should also be clearly indicated how many candidates from each type and level of court may be elected to the NCJ. The proposed distribution of seats for judges-members of the National Council of the Judiciary could be as follows:

- from among the proposed candidates - judges of the Supreme Court, the Sejm would elect two members of the National Council of the Judiciary;
- the Sejm would elect one member of the National Court Register from among the proposed candidates - judges of the Supreme Administrative Court;
- from among the proposed candidates - judges of voivodeship administrative courts, the Sejm would elect one member of the National Council of the Judiciary;
- from among the proposed candidates - judges of courts of appeal, the Sejm would elect two members of the National Council of the Judiciary;
- from among the proposed candidates - judges of regional courts, the Sejm would elect three members of the National Council of the Judiciary;
- from among the proposed candidates - judges of district courts, the Sejm would elect five members of the National Council of the Judiciary;
- from among the proposed candidates - judges of military courts, the Sejm would elect one member of the National Council of the Judiciary.

If the appropriate number of judges-candidates from a given type of court were not presented, the Sejm would select members of the National Council of the Judiciary from among candidates – judges of a different type of court.

3. Assessment of the constitutionality of the referenced proposals

Article 187 (1) point 2 of the Constitution provides that the National Council of the Judiciary consists of fifteen members elected from among judges of the Supreme Court, common courts, administrative courts and military courts. In paragraph 4 of the same article, it is stated that the system,

scope of activities and mode of work of the NCJ, as well as the method of electing its members, are specified by statute. The above-mentioned provisions do not prejudge the need for a statutory determination of the division of seats in the National Court Register between judges adjudicating in individual types of courts, but their wording leaves the ordinary legislator such a possibility. The mere fact of enumerating judges of particular types of courts as members of the National Council of the Judiciary is, however, a certain directive that was formulated by the ordinary legislator vis-à-vis the ordinary legislator.

As stated twice by the Constitutional Tribunal[62], in order to uphold the principle of equality before the law (Article 32 of the Constitution), it is necessary to structure the procedure for selecting members of the National Council of the Judiciary in such a way that each judge has the right to vote and be elected. It should be noted that the necessity to ensure passive and active electoral rights to all does not mean that the legislator cannot determine the distribution of seats in the National Council of the Judiciary that would ensure proper representation of judges in this body. In view of the above, the proposal ensuring a uniform model of selecting candidates for members of the National Council of the Judiciary, ensuring passive and active voting rights for all judges, and the statutory allocation of seats in the National Council of the Judiciary, which guarantees proper representation of the judiciary community, should be considered compliant with the Constitution.

4. Proposed implementation of the recommended solutions

In order to implement the proposed solutions into the Polish legal system, the Act of 12 May 2011 on the National Council of the Judiciary should be amended. Article 9a (1) 1-2 should read as follows:

"1. From the presented candidates, the Parliament selects fifteen members of the Council for a joint four-year term of office, including: two judges of the Supreme Court, one judge of the Supreme Administrative Court, one judge of a provincial administrative court, two judges of an appeal court, three judges of a regional court, five judges of a district court and one a judge of a military court.

2. In the event of failure to present an appropriate number of judges-candidates from a given type of court, the Sejm shall elect members of the Council from among judges-candidates of a different type of court."

Article 11a (1) 2 and 3 should read as follows:

"2. Entities authorized to propose candidates for the Council:

1. the General Assembly of the Judges of the Supreme Court,

2. the General Assembly of the Judges of the Supreme Administrative Court,

62 Judgment of the Constitutional Tribunal of 18 July 2007, ref. no. K 25/07, OTK-A 2007/7/80; judgment of the Constitutional Tribunal of 20 June 2017, ref. no. K 5/17, OTK-A 2017/48.

3. the general assembly of judges of a voivodship administrative court,

4. the general assembly of the judges of the court of appeal,

5. the general assembly of judges of a regional court,

6. the general assemblies of judges of district courts of a given circuit, meeting jointly, convened by the president of the competent regional court,

7. the Assembly of Judges of Military Courts

3. One application may refer to only one candidate for a Supervisory Board member. The entities referred to in paragraph 1. 2 may present up to three candidates."

Article 11a (1) 5 should read as follows:

"5. The candidate's application shall include information about the candidate, hitherto performed functions and social activities, and other important events taking place during the candidate's performance of the office of a judge, as well as the number of votes of support received. The judge's consent to stand as a candidate is attached to the application."

Article 11b (1) 1 should read as follows:

"1. The application of a candidate shall be made in writing by the chairman of the entity referred to in Art. 11a paragraph 2."

Items 2-8 of the same article should be repealed, and par. 9 should read as follows:

"9. The template for the application of a candidate for a member of the Council shall be established by a regulation by the minister responsible for justice. The template should contain information about the candidate, hitherto performed functions and social activities, and other important events taking place during the candidate's performance of the office of a judge, as well as the number of votes of support received."

Article 11d (1) 4 should be repealed, and par. 5 should read as follows:

"5. The Parliament elects Council members for a joint four-year term of office, at the next session of Parliament, by an absolute majority of votes in the presence of at least half of the statutory number of deputies, voting separately on each of the presented candidates.

Article 11d (1) 6 should be repealed.

05

"Opinion on the announced proceedings of the European Commission against Poland in the scope of the so-called "LGBT-free zones"

Main theses:

1. **The only accusation by the European Commission against the Polish state is "the lack of cooperation on the part of the Polish authorities with the Commission in the scope of the Commission's examination of compliance with EU law of the resolutions adopted in Poland on the so-called 'LGBT-free zones'"** (document from July 15th, 2021, section 2.6.).

2. According to the Commission, in its letter from April 19th, 2021, Poland did not provide any answers to 9 out of 12 questions (2, 3, 4, 5, 6, 9, 10, 11, and 12), which were in a Commission letter from February 16th, while the remaining 3 out of 12 questions (1, 7, and 8) were only answered partially. **The absence of answers to the majority of questions and the non-exhaustive replies to the remaining ones are considered by the Commission to constitute a breach of Art. 4 sec. 3 of the Treaty on European Union.**

3. **Declarations of opposition to the "LGBT ideology" are a different type of document than the Local Government Charter of Family Rights (LGCFR)**, prepared with the participation of the Ordo Iuris Institute. Contrary to the intentions of the European Parliament, which in its resolutions incorrectly identified these two documents several times, the proceedings of the European Commission do not apply to the LGCFR.

4. **None of the declarations of Polish local governments against the "LGBT ideology" established a "zone" free from any individuals or groups of people**. City councilors defined the "LGBT ideol-

ogy" as a set of "controversial views – on marriage, family, ways of showing human sexuality, early sexualization of children – that are not shared by a significant part of society" and "attempts to forcefully implement them in education, culture, and social life".

5. The declarations were made as a response to the "LGBT + declaration" by Rafał Trzaskowski of February 18th, 2019. Among the numerous agendas of this document, there were three types of actions that should be assessed as objectively contrary to Polish law, and for this reason they were specified in the declarations of city councilors. It is these unlawful actions, and not any particular individuals, that, in their opinion, constitute a manifestation of the "LGBT ideology".

6. The vast majority of regional administrative courts (10 rulings out of 14) recognized the legality of such declarations. **The courts stated that – contrary to false information about the alleged existence of "LGBT-free zones" – this type of declaration "does not concern the presentation of an ideology that is prohibited by law and does not interfere with the public law sphere". It was also emphasized that such an act "does not contain phrases of discrimination against LGBT persons, nor limiting their rights".**

7. **The reaction to the ongoing proceedings of the Secretary of State in the Ministry of Funds and Regional Policy, who mistakenly identified the discussed declarations of opposition to the "LGBT ideology" with the LGCFR, should be considered as completely inaccurate**. The Local Government Charter of Family Rights, as a document which does not contain a single reference to the LGBT movement, is a safe alternative to the other resolutions which – although, as it has been shown, are not discriminatory in nature – are controversial in the eyes of Western politicians

8. A valuable point of reference is the case of the City Council in Wilamowice, which – in response to similar accusations – **replaced the resolution containing a statement that "LGBT representatives undermined the concept of the family model" with the Local Government Charter of Family Rights, which allowed the city to keep funds from the Norwegian Funds**.

1. Proceedings of the European Commission against Poland

1.1. Background: "EU LGBTIQ Equality Strategy" of November 12th, 2020.

On November 12, 2020, the European Commission announced[63] the creation of the first EU "Strategy for LGBTIQ Equality 2020-2025"[64]. This document consists of 4 basic pillars concerning various aspects of the life of people with homosexual tendencies and gender identity disorders in the social space. Some of the proposals contained in the document do not raise any doubts and result directly from the general principles and guarantees of the human rights system. These include, among others postulates of combating discrimination in the workplace, limiting unnecessary surgical interventions

63 *A Union of Equality*, https://poland.representation.ec.europa.eu/news/unia-rownosci-2020-11-13_pl?etrans=en, access: 21.09.2021.
64 *LGBTIQ Equality Strategy 2020-2025*, https://ec.europa.eu/info/sites/default/files/lgbtiq_strategy_2020-2025_en.pdf , access: 21.09.2021.

in relation to children with gender identity disorders or combating violence and aggression towards people with different sexual inclinations. However, the Strategy also includes attempts to introduce new concepts and categories of rights that are not justified by the applicable norms and for which there is no consensus among the Member States of the European Union. They also constitute an unauthorized attempt to go beyond the powers granted to the Union in the treaties and the principles of proportionality and subsidiarity, directly affecting the Polish constitutional order. What is particularly appalling is the fact that in the issued document the Commission duplicates false information disseminated in the public space by radical activists about the alleged existence in Europe (implicitly: in Poland) of "LGBT-free zones". This document has been thoroughly analyzed by experts from the Ordo Iuris Institute for Legal Culture[65].

1.2. Background: previous resolutions of the European Parliament

So far, the European Parliament has adopted three resolutions confronting the policy of the Polish state with the political postulates of the LGBT movement:

1.2.1 Resolution from December 18th, 2019[66],

It stated that "since the beginning of 2019, more than 80 local governments in Poland have adopted resolutions declaring that they are free from the 'LGBT ideology' or approved the Local Government Charter of Family Rights or its most important provisions that discriminate in particular against single-parent families and LGBTI families", "these resolutions urge local authorities to refrain from taking any actions encouraging tolerance for the LGBTI community, from providing financial support to non-governmental organizations working to promote equal rights, from conducting non-discriminatory education or from supporting the LGBTI community in any other way", "the creation of LGBTI-free zones, even if they do not impose physical barriers, is an extreme discriminatory measure that restricts the freedom of movement of EU citizens".

In light of this, the European Parliament "strongly condemns any discrimination against the LGBTI community and their fundamental rights by public authorities, including incitement to hatred by public authorities and elected officials during election campaigns, and the recent declarations on "zones free from LGBT ideology" in Poland and calls on the Commission to strongly condemn these forms of discrimination in the public sphere" and demands that the Commission assesses whether the creation of LGBTI-free zones violates the freedom of movement and residence in the EU, which would violate Art. 3 sec. 2 TEU, Art. 21 TFEU, Part Three, Titles IV and V, and Art. 45 of the Charter; calls on the Commission to determine whether Poland has failed to fulfill its obligations under the Treaties and whether, pursuant to Art. 258 TFEU, the Commission should issue a reasoned opinion on this matter".

65 *Przeciw dyskryminacji, przeciw ideologii. Odpowiedź Instytutu Ordo Iuris na Strategię na rzecz równości LGBTIQ 2020-2025 Komisji Europejskiej*, red. K. Pawłowska, T. Zych, Fundacja Instytut na rzecz Kultury Prawnej Ordo Iuris, Warszawa 2020, https://ordoiuris.pl/sites/default/files/inline-files/Strategia_LGBT_odpowiedz_OI.pdf, access: 21.09.2021.

66 European Parliament resolution of 18 December 2019 on public discrimination and hate speech against LGBTI people, including LGBTI free zones (2019/2933(RSP)), https://www.europarl.europa.eu/doceo/document/TA-9-2019-0101_EN.html, access: 21.09.2021.

1.2.2 Resolution from September 17th, 2020[67],

In this resolution, the European Parliament "reminds, also in the context of the 2020 presidential election campaign, of its position expressed in its resolution of December 18th, 2019, in which it strongly condemned any discrimination against the LGBTI community and violations of their fundamental rights by public authorities, including hate speech by public authorities and elected officials, prohibition of Equality Parades and awareness-raising programs, as well as insufficient protection against attacks aimed at them, declaration of zones free from the so-called LGBT ideology and the adoption of the Local Government Charter of Family Rights, which discriminates especially against single-parent families and LGBTI families".

1.2.3. Resolution from March 11th, 2021[68]

In this resolution, MEPs state that "since March 2019, over 100 provinces, counties, and communes across Poland have adopted resolutions announcing that they are free from the so-called LGBTI ideology, or adopted the 'Local Government Charter of Family Rights'", "the resolutions on LGBT-free zones declare opposition to the 'LGBT movement ideology' and calls on local authorities to refrain from any actions promoting tolerance towards LGBTIQ persons, including withdrawal of financial aid for organizations whose aim is to promote non-discrimination and equality", "'Local Government Charters of Family Rights' contain a very narrow definition of the family, and at the same time they urge municipalities to protect family rights in all policies, initiatives and funding" , "Focusing exclusively on these forms of the family, the Local Government Charter of Family Rights indirectly calls for discrimination against all other family models – in particular one-parent families, same-sex families and queer families – and to withhold financial support for projects and initiatives that protect and promote fundamental rights, organize anti-discrimination education or in any other way support equality and the LGBTIQ community", "The Polish Ombudsman brought nine complaints against several provinces, counties, and municipalities that adopted resolutions on freedom from 'the LGBT ideology', as a result of which administrative courts have so far recognized four resolutions as unconstitutional", "Norway withdrew from granting funds to Polish voivodships, counties, and communes which, pursuant to the resolution, declared themselves free from the so-called LGBTI ideology or adopted the 'Local Government Charter of Family Rights'", and "the Commission rejected applications for EU funding under the 'Town Twinning program submitted by Polish cities that declared LGBTI-free zones or adopted resolutions on family rights".

1.3. European Commission Letter from February 16th, 2021

On February 16th, 2021, the European Commission sent a letter to the Polish government (ref. Ares (2021) 1287785) signed by Joost Korte, Salla Saastamoinen, and Marc Lemaître. According to the Commission, the letter is a reaction to "a series of letters from non-governmental organizations and

67 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/2017/0835 final - 2017/0360 (NLE), https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2017:0835:FIN, access: 21.09.2021.

68 European Parliament resolution of 11 March 2021 on the declaration of the EU as an LGBTIQ Freedom Zone (2021/2557(RSP)), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021IP0089, access: 21.09.2021.

individuals who complain that in 2019 over 90 Polish municipalities, counties, and provinces adopted resolutions opposing the so-called 'LGBT ideology' or declaring that these places are a zone free from such an 'ideology'. In the opinion of the authors of these letters, such resolutions constitute a breach of EU law". The Commission then cites individual provisions of EU law prohibiting discrimination on the basis of sexual orientation or gender.

The Commission asked the Polish Government **12 specific questions**:

1. What is the legal status of the resolutions on "freedom from LGBT ideology" in Polish law? In particular, are they binding and, if so, for whom? How many such declarations or resolutions have been adopted? Are they formulated in the same way or are they different? If they are different, could you please give us five different examples?

2. Can you specify how many judgments have been issued in Polish courts on the compliance of these resolutions with Polish law and possibly with EU law? Please provide the text of all available judgments and information on all pending cases, providing the court, case number, and a summary of the facts and complaints.

3. Can you explain what "freedom from LGBT ideology" actually means? Does "LGBT ideology" mean anything other than the right of LGBT people not to be discriminated against under EU law, and if so, what is the difference?

4. What exactly does the text of the resolution on "freedom from LGBT ideology" cited in sec. 1.1 above mean? When it comes to recruiting or selecting LGBT people as contractors, can you give examples of "unprofessional criteria" being imposed on teachers and entrepreneurs? Could you also cite examples of "administrative pressure to apply political correctness in selected professions"?

5. For which categories of employees and to what extent are local governments, and in particular municipalities, involved in the recruitment process and in determining working conditions? They seem to play such a role at least in schools, kindergartens, libraries and municipal companies

6. Can the local and regional authorities (at the commune, county, and voivodship level) which adopted the resolutions in question – formally or in fact – exert a decisive influence on the recruitment strategy of another (potential) employer (e.g. in situations where such an employer is financially or otherwise dependent on these authorities)? Are there any references to the statements and resolutions referred to in the questions above in procurement documents or calls for proposals published or managed by these local or regional authorities?

7. Have there been any incidents of discrimination on the basis of sexual orientation or gender reassignment in the preparation and implementation of the programs affecting the operations co-financed by ESI funds? To demonstrate this, managing authorities should present an analysis of the rejected applications and the reasons for the rejection decision against the accepted applications.

8. How did Poland implement the methodology described in the "Guidelines for the implementation of the principle of equal opportunities and non-discrimination, including accessibility for people with disabilities, and the principle of equal opportunities for women and men under EU funds for 2014-2020" in order to meet the criterion qualification relating to "the requirement to comply with the horizontal principle of non-discrimination on the basis of [...] sexual orientation"?

9. What concrete steps are taken at the regional level to ensure that the obligation under Art. 7 of Regulation (EU) 1303/2013 and Art. 8 of Regulation (EU) 1304/2013 (i.e. commitment to take appropriate steps to prevent any form of discrimination / to support specific measures to combat all forms of discrimination based on, inter alia, gender or sexual orientation), bearing in mind that that the same regional bodies that adopted the resolutions in question also have an impact on the implementation and spending of ESI funds for 2014-2020?

10. What instruments does the managing authority have to determine whether the entities managing the infrastructure or premises intended for public use, which were built, renovated or purchased with ESI funds, ensure non-discriminatory access to the infrastructure or facilities (especially in the case where such a managing entity is subject to or otherwise controlled by the authority that adopted the "anti-LGBT resolution")? Will the managing authority suspend or withdraw the support from ESI Funds if such non-discriminatory access is not provided?

11. Does the document setting out the conditions for support under the ESI Funds contain a clause prohibiting any discrimination on the basis of gender or sexual orientation in the use of projects by so-called "end-users", ensuring a partial or complete suspension or cancellation of support if this condition is not met?

12. Please provide a list of projects and their beneficiaries for all projects supported by ESI funds and implemented at the commune, counties, or voivodship level, in regions that have adopted "anti-LGBT resolutions", together with the total amount of co-financing allocated to these projects so far.

1.4. Response of the Government Plenipotentiary for Equal Treatment from April 19th, 2021

The reply to the Commission's letter was formulated on April 19th, 2021 by the Government Plenipotentiary for Equal Treatment (reference number BRT-XXI.6103.1.2021.AN).

The Plenipotentiary recalled that "the basis for the activity of local government units is the constitutional principle of the independence of local government units, which does not allow central government administration bodies to interfere with their substantive tasks", therefore "central government administration bodies do not have the power to sovereignly interfere with the substantive powers of the bodies of local government units".

The Plenipotentiary's reply also emphasized the fact that "the judgments of the Voivodship Administrative Courts show that the resolutions adopted do not constitute acts of local law, which establish rights and obligations. Resolutions do not constitute acts in the field of public administration, which would constitute a manifestation of public-law authority exercised by public administration bodies, including local government units. They do not impose any rights or obligations on citizens, and do not restrict or take away any rights. They can be equated with declarations representing only the views of councilors on ideological and social issues".

The Plenipotentiary stressed **the need to distinguish between the declaration of opposition to the "LGBT ideology" and the Local Government Charter of Family Rights, which "is a document intended to set the direction of family policy at the local level", "there are no references to people identifying with the LGBT movement", and "no element of the LGCFR affects the legal situation of people living together in relationships other than marriage".**

In response to the concerns of the Commission, it was reassured that "regarding the application of anti-discrimination regulations at the level of national operational programs for 2014-2020, for which the Ministry of Funds and Regional Policy (MFRP) acts as the managing authority, **no cases of discrimination on the basis of sexual orientation or gender reassignment have been reported. There were also no complaints regarding discrimination against applicants who applied for funding**. [...] In light of the detailed answers given by the [voivodeship] marshals and the lack of signals about irregularities, there were no grounds for the MFRP to take action against managing authorities, which under the applicable rules of the European structural and investment funds (ESIF) management system are fully responsible for the correct implementation of regional operational programs".

1.5. Announcement of the proceedings from July 15th, 2021

On July 15th, 2021, the European Commission announced, "the initiation of infringement proceedings against Hungary and Poland related to equality and protection of fundamental rights". As stated in the announcement, "in the case of Poland, the Commission considers that Polish authorities have failed to respond to **the Commission's inquiry regarding the nature and impact of the resolutions on the so-called LGBT-free zones in a full and adequate manner**, adopted by several Polish regions and communes. Both Member States have two months to respond to the concerns raised by the Commission. Otherwise, the Commission may decide to send them a reasoned opinion and then refer the cases to the Court of Justice of the European Union". The Commission highlights that, "from 2019, several Polish municipalities and regions have adopted resolutions on the creation of the so-called LGBT-free zones. **The Commission is concerned that these statements may breach EU law on non-discrimination on the basis of sexual orientation**. Therefore, a detailed analysis of the compliance of these resolutions with EU law should be carried out. In order to complete its assessment, the Commission needs adequate and comprehensive information from the Polish authorities. **Despite an explicit request from the Commission in February, the Polish authorities have not provided the requested information thus far, clearly avoiding responding to most requests from the Commission**. Poland thus hinders the Com-

mission from exercising the powers conferred on it by the Treaties and violates the principle of sincere cooperation under Art. 4 sec. 3 TEU, which obliges Member States to truly cooperate with the institutions of the Union. Therefore, the Commission decided to send a formal notice of non-cooperation to Poland"[69].

The Commission essentially raised two allegations against Poland:

- Direct procedural objection concerning the government of the Republic of Poland: **"the Polish authorities did not fully and adequately respond to the Commission's inquiry regarding the nature and impact of the resolutions concerning the so-called LGBT-free zones adopted by several Polish regions and communes".**

- Substantive, indirect allegation concerning Polish local governments: "From 2019, several Polish municipalities and regions have adopted resolutions on the creation of the so-called LGBT-free zones. **The Commission is concerned that these statements may breach EU law on non-discrimination on the basis of sexual orientation".**

On the same day, the official profile of the Government Plenipotentiary for Equal Treatment published the following statement: "[the European Commission] issued a letter on the resolutions to which we responded within the indicated deadline, i.e. in April 2021. We are also in contact with the European Commission on this matter"[70].

1.6. European Commission Letter to the Ministry of Foreign Affairs from July 15th, 2021

In a letter from July 15th, 2021 (INFR (2021) 2115, C (2021) 5221), the European Commission raised allegations against the "lack of cooperation by the Polish authorities with the Commission in the Commission's examination of compliance with EU law, in particular with 2000/78 / EC, 2006/54 / EC and 2004/113 / EC and Regulations (EU) No. 1303/2013 and 1304/2013, adopted resolutions in Poland on the so-called 'LGBT-free zones'. The Commission has received a number of complaints alleging that these resolutions infringe EU law which prohibits discrimination on the basis of sexual orientation and gender, as well as the Charter of Fundamental Rights of the European Union".

According to the Commission letter from April 19th, Poland did not provide any answers to 9 out of 12 questions (2, 3, 4, 5, 6, 9, 10, 11, and 12) asked by the Commission in its letter from February 16th, and the remaining 3 out of 12 questions (1, 7 and 8) were only answered partially. The absence of answers to the majority of questions and the non-exhaustive replies to the remaining ones are considered by the Commission to constitute a breach of Art. 4 sec. 3 of the Treaty on European Union.

69 Representation in Poland, *LGBTIQ rights: "yellow card" for Poland and Hungary*, https://poland.representation.ec.europa.eu/news/prawa-osob-lgbtiq-zolta-kartka-dla-polski-i-wegier-2021-07-15_pl?etrans=en, access: 21.09.2021.

70 A. Schmidt, https://twitter.com/RTraktowanie/status/1415611286575013888, access: 21.09.2021.

1.7. European Commission Letter to voivodeship marshals from September 3rd, 2021

On September 3, 2021, the European Commission sent a letter to the marshals of the Lubelskie, Łódzkie, Małopolskie, Podkarpackie and Świętokrzyskie voivodeships (sign Ares (2021) 5444303) as representatives of institutions managing EU funds. The Commission stated that "the Polish authorities did not fully and adequately respond to its inquiry regarding the nature and impact of declarations, statements or resolutions adopted by the regional authorities about so-called" LGBTIQ-free zones".

The Commission "underlines your [marshals] responsibility as managing authorities of EU funds to provide comprehensive answers to the questions raised by the Commission". In this context, the Commission is communicating „a suspension of the REACT-EU amendments to your [Marshals] Regional Operational Programs". The author of the letter, Normunds Popens, "stresses that the Commission needs an adequate and comprehensive explanation and will be grateful for confirmation of any remedial action on declarations".

It should be emphasized that **none of the five voivodships established any "zone"**. The resolutions adopted by these voivodships are in fact:

1. The statement of the Lublin Voivodeship Parliament of April 25th, 2019 on the introduction of the "LGBT" ideology to local government communities[71].
2. Resolution of the Lodzkie Voivodship Parliament of January 28th, 2020 on the adoption of the Position of the Lodzkie Voivodship Parliament – the Local Government Charter of Family Rights72,
3. Declaration No. 1/19 of the Lesser Poland Regional Assembly of April 29th, 2019 on opposition to the introduction of the "LGBT" ideology to local government communities[73],
4. Resolution No. VIII / 140/19 of the Podkarpackie Voivodeship Parliament from May 27th, 2019 on adopting the position of the Podkarpackie Voivodeship Parliament expressing opposition to the promotion and affirmation of the ideology of the so-called LGBT movements (Lesbian, Gay, Bisexual, Transgender)[74],
5. Resolution No. X / 125/19 of the Sejmik of the Świętokrzyskie Voivodeship of June 19th, 2019, adopting a stance of opposition to attempts to introduce the "LGBT" ideology in local government communities and promote this ideology in public life[75].

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71 The position of the Lublin Voivodeship Sejmik of April 25, 2019 on the introduction of the „LGBT" ideology to local government communities, https://umwl.bip.lubelskie.pl/index.php?id=57&p1=szczegoly&p2=1382854, access: 21.09.2021.

72 Resolution of the Sejmik of the Lodz Region of January 28, 2020 on the adoption of the Position of the Sejmik of the Lodz Region - the Local Government Charter of Family Rights, https://bip.lodzkie.pl/files/Uchwa%C5%82a_260_2.pdf , access: 21.09.2021.

73 Declaration No. 1/19 of the Lesser Poland Regional Assembly of April 29, 2019 on opposition to the introduction of the „LGBT" ideology to local government communities, https://bip.malopolska.pl/umwm,a,1594074,deklaracja-nr-119-sejmiku-wojewodztwa-malopolskiego-z-dnia-29-kwietnia-2019-r-w-sprawie-sprzeciwu-wo.html, access: 21.09.2021.

74 Resolution No. VIII / 140/19 of the Sejmik of the Podkarpackie Voivodeship of 27 May 2019 on adopting the position of the Podkarpackie Voivodeship Sejmik expressing opposition to the promotion and affirmation of the ideology of the so-called LGBT, https://bip.podkarpackie.pl/attachments/article/4617/140.pdf, access: 21.09.2021.

75 Resolution No.X / 125/19 of the Sejmik of the Świętokrzyskie Voivodeship of June 19, 2019 adopting a position on opposition to attempts to introduce the „LGBT" ideology to local government communities and the promotion of this ideology in public life, http://bip.sejmik.kielce.pl/826-oswiadczenia-stanowiska-i-apele-sejmiku-wojewodztwa-swietokrzyskiego-vi-kadencji-lata-2018-2023/7457-stanowisko-sejmiku-wojewodztwa-swietokrzyskiego-dotyczace-sprzeciwu-wobec-prob-wprowadzenia-ideologii-lgbt-do-wspolnot-samorzadowych-oraz-promocji-tej-ideologii-w-zyciu-publicznym.html, dostęp: 21.09.2021.

1.8. European Parliament Resolution from September 14th, 2021

On September 14th, 2021, the European Parliament adopted a resolution "on LGBTIQ rights in the EU" (2021/2679 (RSP)). Recital C of this resolution repeats the groundless statements, according to which Poland "violates the principles of non-discrimination, equality and freedom of speech, and where the 'Local Government Charter of Family Rights' and resolutions defining communes and regions as free from the 'LGBTI ideology' (the so-called LGBTI free zones)".

In contrast, paragraph 14 asks the Commission to "address discrimination against LGBTIQ communities in Poland and Hungary in order to induce those Member States to correctly apply and comply with EU legislation in this area". Instead, the Council was called upon by Parliament to "resume discussions on Art. 7 TEU v. Poland and Hungary, including in relation to the rights of LGBTIQ persons".

The European Parliament also called on the Commission to "make full use of the available tools – in particular accelerated infringement procedures and requests to the Court of Justice for interim measures, as well as budgetary instruments – to address the clear risk of a serious breach by Poland and Hungary of the values of on which the Union is founded". These expressions should be interpreted as encouraging the Commission to adopt an aggressive attitude in the proceedings at hand. This approach is hostile to Poland and violates the foundations of the EU treaties.

The axiological foundations of the resolution are the biggest cause for concern. Point 4 states that **"the EU must adopt a common approach to the recognition of same-sex marriages and partnerships"**; Member States were called upon to introduce into their legal order "measures to facilitate recognition of the legality of transgender parents".

Point 5, however, expresses the opinion that, "EU law prevails over any type of national law, including over conflicting constitutional provisions, and that therefore, Member States cannot, invoke any constitutional ban on same-sex marriage or constitutional protection of 'morals' or 'public policy' in order to obstruct the fundamental right to free movement of persons within the EU in violation of the rights of rainbow families that move to their territory".

1.9. Letter of the secretary of state Waldemar Buda from September 15th, 2021

On September 15th, 2021, the day after the resolution of the European Parliament, Waldemar Buda, secretary of state at the Ministry of Funds and Regional Policy, issued a letter (case ref .: DRP-Ia.66.10.99.2021.2.ASB) addressed to leaders of local self-government units. This letter stated that

"The prohibition of discrimination in political, social, or economic life for any reason stems from the Polish Constitution directly. Each resolution or position on the worldview adopted by the governing bodies of self-government at various levels must be consistent with the Constitution. Bearing in mind the above, I am asking local governments, whose legislative bodies have adopted such documents, to analyze them and verify that they do not contain provisions that could potentially – even against the intentions of decision-making bodies –become the subject of overinterpretation in this respect.

An example of such an over-interpretation are, in our opinion, comments made to the **Self-Government Charter of Family Rights, which in their intentions and essentially relate to supporting the family and parenthood. As such, they do not violate the principles of equality before the law of all citizens and the prohibition of discrimination on any grounds**. Sometimes, however, the imprecise wording of these documents is the subject of public discussion in the context of discrimination. If such provisions are identified, I kindly ask you to make appropriate modifications."

2. Legal framework of European Commission jurisdiction

2.1. Initial remarks

In September 2012, in his annual State of the European Union (hereinafter: EU) address to the European Parliament, President José Manuel Barroso said: "We need a more developed range of instruments – it is not enough to choose between the soft power of political persuasion and the radical solution under Art. 7 of the Treaty"[76]. The answer to this need was to be the Communication of the European Commission to the European Parliament and the Council "A new EU Framework to strengthen the Rule of Law" (hereinafter: the Communication)[77]. The Communication sets out a new EU Rule of Law Framework as a contribution by the Commission to strengthening the EU's capacity to ensure effective and equal protection of the rule of law in all Member States.

At this point, it is necessary to emphasize the extremely important difference between the document, which is the Communication, and the mechanism of Art. 7 of the Treaty on the EU (hereinafter: TEU). The Communication has a preventive function, and the mechanism under Art. 7 TEU – a reformative function. The mechanisms indicated in the contents of the Communication are therefore aimed at addressing future threats to the rule of law in the Member States before the conditions for activating the mechanisms provided for in Art. 7 TEU are met.

The assumptions of the Commission Communication and its activities in this area were, in fact, unfounded. The Communication underlines that, "The Commission is the guardian of the Treaties and has the responsibility of ensuring the respect of the values on which the EU is founded and of protecting the general interest of the Union. It must therefore play an active role in this respect". It was the beginning of the unilateral expansion of their powers by the EU bodies which, ignoring the treaties, started limiting the sovereignty and possibility of the member states to create their own law. On December 20th, 2017, a new stage of the procedure for monitoring the state of the rule of law in the Member States began, which opened the door to further accusations against Poland, including accusations relating in particular to democracy and human rights.

76 J.M. Durão Barroso (President of the European Commission), *State of the Union 2012 Address*, Plenary session of the European Parliament/Strasbourg 12 September 2012, https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_12_596, access: 21.09.2021.

77 Communication from the Commission to the European Parliament and the Council "A new EU Framework to strengthen the Rule of Law", EUR-Lex - 52014DC0158 - EN - EUR-Lex (europa.eu) (access: 21.09.2021).

Pursuant to Art. 258 of the Treaty on the Functioning of the European Union (Official Journal of the European Union, C 115, 09.05.2008), "if the Commission considers that a Member State has failed to fulfill an obligation under the Treaties, it shall issue a reasoned opinion on the matter, having given that State an opportunity to submit its comments in advance. If that State does not comply with the opinion within the time limit set by the Commission, the Commission may bring the matter before the Court of Justice of the European Union".

In the absence of a reply or a satisfactory one, the Commission communicates to national governments why it believes that the Member State has breached EU rules, and the national government then has a further two month period to rectify the situation.

The principle of sincere cooperation is formulated in Art. 4 sec. 3 TEU: "Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties".

Among the sources of EU law there are also provisions on non-discrimination on the basis of sexual orientation:

- Charter of Fundamental Rights, art. 21 sec. 1: "**Any discrimination based on any ground such as** sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or **sexual orientation** shall be prohibited".

- Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation:

    - Point 11 of the Preamble: "Discrimination based on religion or belief, disability, age or sexual orientation may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons",

    - Point 12 of the Preamble: "To this end, any direct or indirect discrimination based on religion or belief, disability, age or sexual orientation as regards the areas covered by this Directive should be prohibited throughout the Community. This prohibition of discrimination should also apply to nationals of third countries but does not cover differences of treatment based on nationality and is without prejudice to provisions governing the entry and residence of third-country nationals and their access to employment and occupation",

    - Point 23 of the Preamble: "In very limited circumstances, a difference of treatment may be justified where a characteristic related to religion or belief, disability, age or sexual orientation constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate. Such circumstances should be included in the information provided by the Member States to the Commission",

- Point 26 of the Preamble: "The prohibition of discrimination should be without prejudice to the maintenance or adoption of measures intended to prevent or compensate for disadvantages suffered by a group of persons of a particular religion or belief, disability, age or sexual orientation, and such measures may permit organisations of persons of a particular religion or belief, disability, age or sexual orientation where their main object is the promotion of the special needs of those persons",

- Point 29 of the Preamble: „ Persons who have been subject to discrimination based on religion or belief, disability, age or sexual orientation should have adequate means of legal protection. To provide a more effective level of protection, associations or legal entities should also be empowered to engage in proceedings, as the Member States so determine, either on behalf or in support of any victim, without prejudice to national rules of procedure concerning representation and defense before the courts",

- Point 31 of the Preamble: "The rules on the burden of proof must be adapted when there is a prima facie case of discrimination and, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought. However, it is not for the respondent to prove that the plaintiff adheres to a particular religion or belief, has a particular disability, is of a particular age or has a particular sexual orientation",

- Art. 1: "The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment",

- Art. 2 sec. 2(b): "indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary(…)".

2.2. Art. 2 of the Treaty on the European Union (TEU)

The Preamble of the TEU indicates that the establishment of the European Union was inspired by "the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law."[78]. Art. 2 TEU directly indicates that, "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in

78 Consolidated version of the Treaty on European Union: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M%2FTXT, access: 21.09.2021.

a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail." The catalogue of these values also includes observance of the rule of law.

The case law of the Court of Justice of the European Union and the European Court of Human Rights does not contain a uniform definition of the "rule of law", but creates the "umbrella principle" or otherwise a meta-principle, which brings together elements with independent normative significance in the EU legal system[79]. They indicate the principles that make up the rule of law, thus aiming to define its basic meaning. These rules include, but are not limited to:

1. the principle of legality,
2. legal certainty,
3. separation of powers,
4. prohibition of arbitrariness in the actions of executive authorities,
5. independent and impartial courts,
6. effective judicial control, including control of respect for fundamental rights,
7. equality before the law[80].

According to the Communication, respect for the rule of law is intrinsically linked to respect for democracy and for fundamental rights: there can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa[81]. It is stated that democracy is protected if the fundamental role of the judiciary, including constitutional courts, can ensure freedom of expression, freedom of assembly and respect of the rules governing the political and electoral process.

The European Commission is acting as the guardian of the rule of law of the Member States. When mechanisms established at the national level to ensure the rule of law cease to function within the limits set by EU bodies, this is a threat to the rule of law and thus to the functioning of the EU as an area of freedom, security, and justice without internal frontiers. In such situations, the EU takes action to protect the broadly understood rule of law.

The Resolution of the European Parliament 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, the Parliament notes that the Commission's justified motion from December 20th, 2017 submitted pursuant to Art. 7 sec. 1 TEU regarding the rule of law in Poland: is limited in scope, i.e. concerns the rule of law in Poland in the strict sense of the independence of the judiciary, and sees an urgent need to extend the scope of the justified motion **by taking into account the clear risk of a serious breach of other fundamental values of the Union, especially democracy and human rights[82]. It should be emphasized that these values are not identical to the values that guided the founding fathers of the European Union**.

79 M. Taborowski, *Mechanizmy ochrony praworządności państw członkowskich w prawie Unii Europejskiej. Studium przebudzenia systemu ponadnarodowego* [Mechanisms of protection of the rule of law of the Member States in the law of the European Union. A study of the awakening of the supranational system], Warsaw 2019, p. 61.

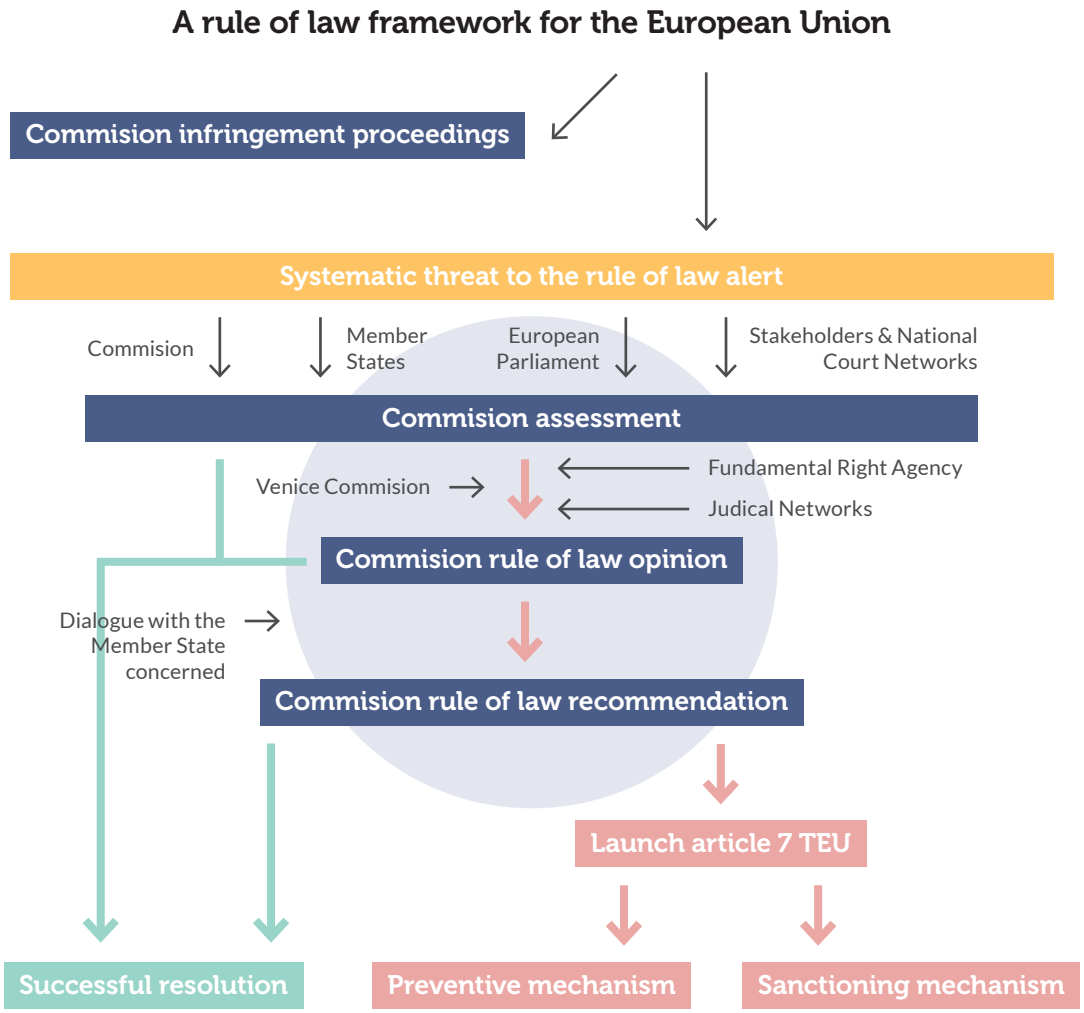
80 Communication from the Commission to the European Parliament and the Council – A new EU Framework to strengthen the Rule of Law, COM(2014) 158 final, Strasburg 11.3.2014 r., Annex I.

81 Communication, p. 4.

82 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 (COM(2017)0835 — 2017/0360R(NLE)).

The resolution calls on the Council and the Commission not to apply a narrow interpretation of the rule of law and to fully use the potential of the procedure provided for in Art. 7 sec. 1 TEU, dealing with the consequences of the actions of the Polish government for all the principles set out in Art. 2 TEU, including democracy and fundamental rights.

It should be emphasized that there are no grounds to indicate a violation of Art. 2 TEU by Poland through "non-cooperation" with the Commission. Annex II to the Communication of the Commission to the European Parliament presents a diagram of activities preceding the implementation of Art. 7 TEU. It is as follows:



Source: *Communication from the Commission to the European Parliament and the Council – A new EU Framework to strengthen the Rule of Law, COM(2014) 158 final, Strasburg 11.3.2014 r., Annex I.*

As can be seen in the presented diagram, in order to apply Art. 7 of the Treaty on European Union, a number of preparatory steps must first be taken. The procedure itself should only be launched when there are "clear indications" of a systemic threat to the rule of law in a given Member State.

At this point, it should be emphasized once again that the European Union has not developed a uniform definition of the rule of law, and what is and what is not lawful is to be decided by EU bodies. This may lead to a situation where actions compliant with the basic law of a given country may turn out to be an "indicator" of a threat to the rule of law for the authorities conducting the proceedings. A similar situation applies to the interpretation of Art. 2 TEU, which can be interpreted broadly. The solution to this problem requires the unification of the interpretation of Art. 2 of the Treaty, which "would not impose a specific system of government on the Member States, but offer criteria allowing to find a violation of the democratic order"[83].

2.3. Art. 7 of the Treaty on the European Union

On the 20th of December 2017 the new stage of rule of law in EU member states monitoring procedure, related to run of art. 7 para. 1 TEU mechanism, has begun. In European Commission press release dated for this day one can read that "for almost two years, to engage the Polish authorities in a constructive dialogue in the context of the Rule of Law Framework, the Commission has today concluded that there is a clear risk of a serious breach of the rule of law in Poland" [84].

The Treaty of Amsterdam introduced a provision (later Article 7 TEU)[85], according to which the Council may determine that a serious and persistent breach of the fundamental principles for the EU was committed by a Member State. As a result of this determination, the Council could decide to suspend certain rights deriving from the application of the Treaty to the Member State concerned. Pursuant to art. 7 sec. 1 TEU, based on a reasoned request from one third of the Member States, the European Parliament or the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, **may find that there is a clear risk of a serious breach by a Member State of the values referred to in Art. 2.**

The mechanism presented in this provision aims to fulfill a preventive role. In order for a procedure to be initiated, it is essential to determine, "that there is a clear risk of a serious breach of values". This wording is rather vague. Both "clear risk" and "serious breach" are purely subjective expressions. The doctrine of the subject assumes that a "serious breach" is one that is "of considerable importance" or that "must be of high intensity and constitutes an obvious violation of great gravity". It should be noted that a violation of "great" or "considerable" importance is also an ambiguous expression.

Sec. 2 of the said provision states that the European Council, **voting unanimously on the motion** of one-third of the Member States or the European Commission and after obtaining the consent of the

83 C. Möllers, L. Schneider, *Safeguarding Democracy in the European Union. A Study on a European Responsibility*, 2018, https://www.boell.de/sites/default/files/boell-foundation_safeguarding-democracy-in-the-european-union.pdf?dimension1=division_euna, access: 21.09.2021, p. 88.

84 *Rule of Law: European Commission acts to defend judicial independence in Poland*, https://ec.europa.eu/commission/presscorner/detail/en/IP_17_5367, access: 21.09.2021.

85 Article 7 of the TEU was, in its present wording, shaped by the Treaty of Lisbon

European Parliament, may, after inviting a Member State to submit its comments, find **a serious and persistent breach of values by that Member State, referred to in Art. 2**.

Art. 354 TFEU indicates that for the purposes of Art. 7 TEU concerning the suspension of certain rights deriving from EU membership, the member of the European Council or the Council representing the Member State concerned **shall not vote, and the Member State concerned shall not be taken into account when calculating the one-third or four-fifths of the Member States provided for in paragraphs 1 and 2 of the said Article**. In the light of Art. 354 TFEU, in the said vote, the country accused of violating Art. 2 TEU is not taken into account. Pursuant to Art. 354 sec. 1 TFEU, abstentions of members present or represented shall not prevent the adoption of a decision.[86].

At this point, however, it should be emphasized that Hungary is also in a similar situation with respect to the European Commission as Poland. The convergence of the interests of these countries suggests that they are capable of mutually blocking the possibility of activating the sanation mechanism with respect to both of them at the same time. Poland and Hungary will be able to block the finding of a serious and permanent violation of the values under Art. 2 TEU. At present, the European Union is unable to conduct the mechanism in question simultaneously with two Member States in a single procedure, which would exclude all these countries from voting. In the literature on the subject, there are voices that, "it would be possible to initiate the procedure under Art. 7 sec. 2 TEU at the same time against a greater number of Member States violating the values of Art. 2 TEU, which would at the same time exclude all these states from voting"[87], but there is no legal basis for such a solution.

In art. 7 sec. 3 TEU, it was indicated that after making a statement pursuant to Art. 7 sec. 2, the Council, acting by a qualified majority vote, may decide to suspend certain rights deriving from the application of the Treaties for the Member State in question, including the voting right of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible effects of such a suspension on the rights and obligations of natural and legal persons.

The referred provision states that the Council of the European Union may decide to **suspend certain rights** arising from the application of the Treaties to a Member State that has committed a serious and persistent violation of Art. 2 TEU. The sanctions imposed on a Member State are not specifically mentioned in the Treaties. They may concern the deprivation of the right to participate and speak in bodies, the deprivation of the possibility of filling important public posts with representatives of that Member State, or budget payments to a Member State. The above leads to the conclusion that it is not possible to exclude a Member State from the European Union on the basis of Art. 7 sec. 3 TEU, because then all rights resulting from the Treaties would be suspended, and the sanctions must comply with the EU principle of proportionality.

86 Art. 354 sentence 1 TFEU states that, "For the purposes of Article 7 of the Treaty on European Union on the suspension of certain rights resulting from Union membership, the member of the European Council or of the Council representing the Member State in question shall not take part in the vote and the Member State in question shall not be counted in the calculation of the one third or four fifths of Member States referred to in paragraphs 1 and 2 of that Article. Abstentions by members present in person or represented shall not prevent the adoption of decisions referred to in paragraph 2 of that Article".

87 M. Taborowski, op. cit., p. 183.

3. Honestly addressing four questions from the European Commission

The answers to questions 5-12, asked by the European Commission in the letter of February 16th, would require knowledge of detailed data to which the authors of this analysis do not have access. However, representatives of the Ordo Iuris Institute for Legal Culture repeatedly referred to the issues raised in questions 1-4, therefore this is also possible in this analysis

3.1. The actual legal status of the declaration of opposition to the "LGBT ideology"

Contents of the question: What is the legal status of the resolutions on "freedom from LGBT ideology" in Polish law? In particular, are they binding and, if so, for whom? How many such declarations or resolutions have been adopted? Are they formulated in the same way or are they different? If they are different, can you please give us five different examples?

In 2019, councilors of about 50 local government units in Poland adopted legally non-binding declarations of opposition to the "LGBT ideology". Therefore, on November 26th, 2019, at the seat of the European Parliament in Strasbourg, under the patronage of the European United Left Euro group, a press conference was held, during which the left-wing activist Kamil Maczuga presented a map entitled, "Atlas of Hate", which marked all these Polish local governments, regardless of the type of resolutions they passed, creating for them a collective, false term "LGBT-free zones". This map became the first element of a large-scale propaganda campaign against Poland, alleging that pro-family resolutions discriminated against people with homosexual inclinations or gender identity disorders.

Unfortunately, the European Parliament believed these false accusations by passing a resolution against Poland on December 18th, 2019, which used the misleading term "LGBT-free zones"[88].

In fact, t**he word "zone" does not appear in any of the declarations passed. Such a term, untruthfully, would suggest that the councilors separated their district, county or voivodship from the rest of Poland, refusing access to a given territory to any person or group of people**, establishing some kind of "no-go zone" known in the West. This phenomenon may also have an indirect effect – for example, anti-Israel resolutions described as "zones free from Israeli apartheid"[89], lobbied in Europe by the Palestinian BDS (Boycott, Divestment, and Sanctions) movement. As in the case of the declaration of opposition to the "LGBT ideology", also here the term "zones" did not appear in any resolution, remaining only a journalistic term. In the form of a resolution, they were adopted by councilors, among others the cities of Leicester, Swansea or Gwynedd in Great Britain (2014)[90], Dub-

88 European Parliament resolution of 18 December 2019 on public discrimination and hate speech against LGBTI people, including LGBTI free zones (2019/2933(RSP)), https://www.europarl.europa.eu/doceo/document/TA-9-2019-0101_EN.html, access: 21.09.2021.

89 Apartheid Free Zones, https://bdsmovement.net/apartheid-free-zones, access: 21.09.2021.

90 Jamie Hailstone, *Councils win Israel boycott case*, https://www.localgov.co.uk/Councils-win-Israel-boycott-case/41148, access: 21.09.2021.

lin in Ireland (2018)[91], or numerous towns or provinces in Spain[92]. Contrary to anti-Israel resolutions calling for real and concrete action, definitely going beyond the statutory powers of individual local governments (boycotting, withdrawing investments, and taking sanctions against the State of Israel), the declarations of Polish local governments opposing the "LGBT ideology" are not characterized by these features.

Firstly, it should be stated that **none of the declarations made by Polish local governments against the "LGBT ideology" constitute a normative act and the intention of local government councilors was by no means to give these declarations legal force**. The right to adopt, in addition to *sensu stricto* resolutions, these types of documents falls within the scope of authority of local government legislative bodies, which was confirmed by the Supreme Administrative Court in the judgment of May 25th, 2017 (file reference number I OSK 297/17): "a resolution constitutes the main form of manifesting the will of the council, although not the only one. In practice, the decision-making body also adopts appeals, motions, declarations, positions, etc. **Such appeals or declarations fall within the right to petition, which stems from a tradition going back hundreds of years**. [...] Undertaking any non-regulatory actions falls within the scope of tasks of the local government units. And **as long as these activities do not go beyond the scope of social and organizational activities (they cannot be enforced by state coercion), it is not required that the local government council has a clear statutory authorization to undertake them**. This is due to the fact that the addressee of non-executive actions, e.g. in the form of an appeal, will behave in accordance with the summons addressed to him. **It is up to the addressee to choose a particular course of action in response** (judgment of the Supreme Administrative Court of April 25th, 2017, I OSK 117/17). This rule also applies to declarations".

3.2. The actual state of jurisprudence of Polish courts on declarations of objection to the "LGBT ideology"

Contents of the question: Can you indicate how many judgments have been issued in Polish courts on the compliance of these resolutions with Polish law and possibly with EU law? Please provide the text of all available judgments and information on all pending cases, specifying the court, case number, and a

It is true that resolutions opposing the "LGBT ideology" have been appealed to the Provincial Administrative Courts 14 times on charges of alleged discrimination. However, out of all 14 cases resolved by judgments issued between 2019-2021, as many as 10 complaints about pro-family declarations were rejected (including 4 – with established finality), and only 4 were considered. The courts stated that – contrary to false information about the alleged existence of "LGBT-free zones" – this type of declaration "does not correspond to the promotion of an ideology that is prohibited by law and as such does not interfere with the sphere of public law" (II SA / Ke 650/19). It was also emphasized that such an act "does not contain phrases which discriminate against nor limit the rights of LGBT persons" (II SA / Rz 27/20).

91 Raphael Ahren, *Dublin council calls to expel Israeli ambassador, endorse* BDS, https://www.timesofisrael.com/dublin-council-calls-to-expel-israeli-ambassador-endorse-bds/ , access: 21.09.2021.

92 *Mapa ELAI, Listado de los Espacios Libres de Apartheid Israelí (ELAI)*, https://boicotisrael.net/elai/mapa/, access: 21.09.2021.

Full list of 10 court decisions which rejected the complaints (including reference numbers):

1. Provincial Administrative Court in Kielce of 30 September 2019 (II SA / Ke 650/19, final decision) – Świętokrzyskie Province,

2. Provincial Administrative Court in Rzeszów of November 22, 2019 (II SA / Rz 1118/19, final decision) – Podkarpackie Province,

3. Provincial Administrative Court in Poznań of April 16, 2020 (II SA / Po 188/20, final decision) – Szczytniki commune,

4. Provincial Administrative Court in Kraków of 23 June 2020 (III SA / Kr 105/20, decision repealed by the Supreme Administrative Court, III OSK 3353/21, new reference number: III SA / Kr 976/21) – Lipinki commune,

5. Provincial Administrative Court in Kraków of June 24, 2020 (III SA / Kr 360/20, decision repealed by the Supreme Administrative Court, III OSK 3682/21, new reference number: III SA / Kr 975/21) - Tarnów poviat,

6. Provincial Administrative Court in Kraków of 6 July 2020 (III SA / Kr 316/20, decision not final) – the commune of Tuchów,

7. Provincial Administrative Court in Rzeszów of September 8, 2020 (II SA / Rz 27/20, decision not final) – Niebylec commune,

8. Provincial Administrative Court in Kielce of 29 December 2020 (II SA / Ke 950/20, final decision) – Świętokrzyskie Province,

9. Provincial Administrative Court in Lublin of February 17, 2021 (III SA / Lu 240/20, decision not final) – Lublin Province,

10. Provincial Administrative Court in Lublin of February 17, 2021 (III SA / Lu 312/20, decision not final) – Rycki poviat.

On the other hand, only four judgments that have been passed contrary to this line of jurisprudence have already been appealed as not final to the Supreme Administrative Court.:

1. Provincial Administrative Court in Gliwice of July 14, 2020 (III SA / Gl 15/20) – Istebna commune,

2. WSA in Warsaw of July 15, 2020 (VIII SA / Wa 42/20) – Klwów commune,

3. WSA in Lublin of 6 August 2020 (III SA / Lu 7/20) – Serniki commune,

4. Provincial Administrative Court in Kielce of September 11, 2020 (II SA / Ke 382/20) – Osiek commune.

3.3. Real attempts to define the term "LGBT ideology" in Polish public debate

Contents of the question: Can you explain what exactly "freedom from LGBT ideology" means? Does "LGBT ideology" mean anything other than the right of LGBT people not to be discriminated against under EU law, and if so, what is the difference?

The contents of the resolutions indicated three examples of activities inspired by the "LGBT ideology":

1. illegal installation of "political correctness officers" (also known as "LGBT lighthouse keepers") in schools,

2. the use of schools as a platform for early sexualization of Polish children in accordance with the so-called World Health Organization standards,

3. exerting administrative pressure to apply political correctness (in some versions: "homopropaganda") in selected professions.

These three unlawful behaviors were opposed by councilors through affirmation of the following three lawful actions:

1. protecting **the right to raise children in accordance with the beliefs of their parents**,

2. protecting students, ensuring that parents, with the help of educators, can **responsibly convey to them the beauty of human love**,

3. **protection of, inter alia, teachers and entrepreneurs against imposing unprofessional criteria on them**, e.g. in educational work, in the selection of employees or contractors.

It is worth noting that **at the very beginning of the resolutions, councilors usually placed a clear objection that the self-government they represented "will not interfere in the private sphere of life that concern Polish families**" and at the end of the resolutions – that this self-government will be faithful to the national and state tradition in the performance of its public tasks, remembering 1053 years of Polish baptism, 100 years of Polish independence, and 30 years of Polish self-government.

Moreover, the local government officials themselves have repeatedly emphasized that **the term "LGBT ideology" they used does not apply to any group of people, including people struggling with homosexual inclinations or gender identity disorders**. For example, the councilors of the city

of Tuchów in the resolution of March 18th, 2020[93] stated that **in the term "LGBT ideology" they understand a set of "controversial views, unshared by a significant part of society, on marriage, family, manifestation of human sexuality, and early sexualization of children" and "attempts to forcing these views in the sphere of education, culture, and social life".**

It should be emphasized here that the declarations of opposition to the "LGBT ideology" were adopted in a specific socio-political context – the councilors came up with this initiative in connection with the declaration announced by the mayor of Warsaw, Rafał Trzaskowski on February 18th, 2019, "Warsaw's urban policy for the LGBT+ community"[94]. It is among the numerous agendas of this document – which, similarly to the declarations of local government officials, do not constitute a normative or executive act – that three types of actions were found to be objectively contrary to Polish law, and which for this very reason were specified by councilors in their declarations.

The "LGBT ideology" against which Polish local government officials have objected, does not mean, therefore, lesbians, gays, bisexual or transgender people, or any other persons identified by their private actions, but an orderly set of views and their implementation by taking these actions in the sphere of public life, objectively contrary to Polish law (installing officials of political correctness in schools, the so-called lighthouse keepers, using schools as a platform for the early sexualization of Polish children, exerting administrative pressure). One of the basic assumptions of the LGBT movement is the rejection of the principle of a dichotomous gender distinction. This principle is anchored in the Constitution of the Republic of Poland (Art. 18, Art. 33) as fundamental to the Polish legal order. It is obvious that not all people with homosexual inclinations or gender identity disorders reject this rule. In short, **not every person with homosexual inclinations or gender identity disorders is a member of the "LGBT +" movement, and not every member of the "LGBT +" movement is a person with homosexual inclinations or gender identity disorders**. There are members of the "LGBT" movement who are not "LGBT" people, and there are also people with homosexual or transgender gender identity disorders who do not identify with the "LGBT" movement.

The fact that people who are not "LGBT persons" also belong to the "LGBT movement" is also confirmed by, for example, Slavoj Žižek – one of the most influential representatives of Marxist philosophy today. In his famous article, "The Sexual is Political" he emphasizes that **the modern abbreviation "LGBT +" is supplemented with the form "LGBTQIAAP", where one of the letters „A" simply means "Allies", which, although they are not themselves "LGBT persons" (ie they do not have homosexual tendencies or gender identity disorders), belong to the "LGBT" movement by the mere fact of participating in the activities of this movement**[95]. Another example of the existence of such a distinction is the British social movement "Get the L out of LGBT", which brings together lesbians who oppose the "LGBT movement", which usurps the right to represent their interests[96].

93 Resolution No. XIX / 192/2020 of the City Council in Tuchów of March 18, 2020 on responding to the complaint of India Cosmetics spółka z o.o. based in Poznań on the Resolution No. 2/2019 of the City Council in Tuchów of May 29, 2019. on the adoption of a resolution on stopping the „LGBT +" ideology by the self-governing community, https://bip.malopolska.pl/umtuchow,a,1743507,stanowisko-w-sprawie-udzielenia-odpowiedzi-na-skarge-adw-pana-przemyslawa-lisa-markiewicza-z-dnia-18.html, access: 21.09.2021.

94 *Mayor of Warsaw signs the LGBT+ Declaration*, https://en.um.warszawa.pl/-/mayor-of-warsaw-signs-the-lgbt-declaration, access: 21.09.2021.

95 S. Žižek, *The Sexual is Political*, https://thephilosophicalsalon.com/the-sexual-is-political/, access: 21.09.2021.

96 *Get The L Out UK*, http://www.gettheloutuk.com/index.html, access: 21.09.2021.

The existence of "LGBT ideology" is still the subject of an ongoing scientific debate in Poland. Prof. Jacek Bartyzel defines "LGBT ideology" as "legal, moral, and social equalization of all forms of activity in the gender sphere, based on the recognition of equivalence of the so-called sexual orientations. Its specific "originality" lies in the fact that it is the first ideology in history that focused its attention on the acceptance of any or almost every method of obtaining sexual satisfaction and granting these practices legal and public status"[97]. The distinctiveness of the ideology underlying the "LGBT movement" is also confirmed by people involved in supporting this movement, such as Jan Hartman, who lists as one of its goals (typical of ideology) the attempt to turbulently overthrow the existing social order: "we are noticing that **some gender and sexual roles are related to the oppression and subordination of women to the power of men – in this case we are in favor of changing the prevailing social customs**". In the same manifesto, Hartman mentions, as intermediate steps in achieving this goal, the institutionalization of homosexual systems, equating them with marriage, and granting such systems the right to raise children. Such institutionalization would require an amendment to Art. 18 of the Polish Constitution as contradictory to its current wording, which only clearly emphasizes the political nature of the postulates of the "LGBT movement". Other postulates of the "LGBT ideology" in the legal and political sphere, and therefore going far beyond the anti-discrimination attitude, are: "if persons belonging to a certain minority in terms of experience and cultural manifestation of gender and sexuality have special needs, the fulfillment of which requires changes in the law or some regulations of the authorities, this kind of facilitation should be implemented for these people". **It is also postulated to legitimize transsexual gender identity disorders**, which is a specific consequence of the previous ideological equation with sexual orientation: change their body so that it better corresponds to the appearance of the gender they identify with, there should be legal and organizational conditions enabling them to make the desired changes". **"LGBT ideology" also includes the introduction of propaganda elements of the "LGBT movement" to public schools**: „We demand that public education take on the task of shaping the attitudes of tolerance and respect for diversity and difference in various areas of culture and customs", understood, however, as "disseminating knowledge about the diversity of attitudes and preferences in the field of sex life and gender identity". **Also, public funding of research should be carried out in the spirit of the "LGBT ideology"**: "We consider it important that scientific research (sociological, psychological, historical) be conducted and supported from public funds on the various - historically culturally variable – forms of manifestation of human sexuality". [98]

3.4. Real examples of unprofessional behavior motivated by "LGBT ideology" in Poland

Contents of the question: What exactly does the text of the resolution on "freedom from LGBT ideology" quoted in point 1.1 above mean? When it comes to recruiting or selecting LGBT people as contractors, can you give examples of 'unprofessional criteria' being imposed on teachers and entrepreneurs? Could you also cite examples of "administrative pressure to apply political correctness in selected professions"?

97 J. Bartyzel, *Is LGBT an ideology?*, https://www.pch24.pl/prof--jacek-bartyzel--czy-lgbt-jest-ideologia-,80687,i.html, PCh24, access: 21.09.2021.
98 J. Hartman, *What is gender and LGBT ideology?*, https://hartman.blog.polityka.pl/2019/06/10/czym-jest-ideologia-gender-oraz-lgbt/, access: 21.09.2021.

Text: *"We will not allow for administrative pressure to be exerted to apply political correctness (rightly sometimes simply called homopropaganda) in selected professions. We will protect, among others teachers and entrepreneurs against imposing unprofessional criteria on them, for example in educational work, in the selection of employees or contractors".*

Examples of "unprofessional criteria" in the spirit of propaganda of LGBT movements have been repeatedly described by the Ordo Iuris Institute for Legal Culture. For example, it is worth mentioning the "Human Rights-Friendly School" program. Contrary to the neutral name, classes for teachers and students were conducted in 2019 by activists of entities belonging to the LGBT movement – the Lambda Warsaw Association (one of the "trust organizations" of the Warsaw LGBT Declaration), the Lublin Homo Faber Association (the organizer of one of the "Equality Marches"), The Gdańsk Tolerado Association for LGBT People and the Polish Diversity Foundation. According to Aldona Machnowska-Góra, director-coordinator for culture and social communication at the Warsaw City Hall, the implementation of this project is "everything that the LGBT community expect and what has been included in the Declaration".[99]

An example of exerting pressure on entrepreneurs was the involvement of the Ombudsman in a 2017 the case against a publisher who refused to provide a service contrary to his worldview, consisting in promoting the LGBT movement. It was only on June 26th, 2019 that the Constitutional Tribunal (case reference number K 16/17) declared this provision unconstitutional, which had been included in the Code of Misdemeanors since the communist times. After the judgment of the Constitutional Tribunal, the judgement convicting the publisher was annulled by the Court of Appeal in Łódź, which was also later confirmed by the Supreme Court on December 8th, 2020 (case reference number II KA 1/20).

4. The Constitution of the Republic of Poland as a point of reference for the authors of individual declarations

W swoich deklaracjach radni nie przyjmują „ograniczonego" czy „dyskryminującego" modelu małżeństwa, rodziny czy wychowania, lecz w pełni opierają się na wzorcach ustrojowych, wynikających z Konstytucji RP, Prawa oświatowego oraz historycznych doświadczeń państwa polskiego. W niniejszym rozdziale wątek ten zostanie rozwinięty.

In their declarations, councilors do not adopt a "limited" or "discriminatory" model of marriage, family or upbringing, but fully rely on the systemic patterns resulting from the Constitution of the Republic of Poland, the Law on the educational system and the historical experiences of the Polish state. In this chapter, this thread will be developed further.

99 N. Bernaciak, *Preliminary analysis of dangerous content contained in the project 'Human rights-friendly school - how to counteract exclusion and violence at school?'"*, https://ordoiuris.pl/sites/default/files/inline-files/Szko%C5%82a_przyjazna_prawom_czlowieka_analiza.pdf, access: 21.09.2021.

4.1. The constitutional family model does not include homosexual concubinage

Already in the preamble to the Constitution of the Republic of Poland, the law-maker states that the fundamental rights of the state are based, inter alia, on "the principle of subsidiarity strengthening the rights of citizens and their communities". The family is the basic social community, which justifies placing the provision that protects it already in Chapter I of the Constitution, and therefore among the systemic principles of the entire legal order of the Republic of Poland – having a higher rank than the provisions of Chapter II, in which specific freedoms, rights, and obligations of man and citizen have already been enumerated.

Pursuant to Art. 18 of the Polish Constitution, "marriage, as a union of a woman and a man, family, motherhood, and parenthood are under the protection and care of the Republic of Poland". The concept of family then appears three times in Chapter II. Pursuant to Art. 47, "everyone has the right to the legal protection of private and family life, honor and good name and to decide about their personal life". The doctrine indicates, however, that out of the four different objects of legal protection mentioned, it is family life that is protected with the greatest intensity – **"the scope of protection of family life, by virtue of a clear decision of the lawmaker, is subject to more protection than the scope of protection of private life. The right to have one's family life respected is related to Art. 18 of the Polish Constitution, constituting its detailed extension[100]. Therefore, the jurisprudence of the Constitutional Tribunal indicates that Art. 47 of the Polish Constitution should be read 'in the context' of Art. 18[101]".**[102]

The Constitutional Tribunal (hereinafter: the CT) has already previously tried to clarify what should be understood by the term "family" in the context of these two articles of the Constitution of the Republic of Poland. It stated that "in the case of analyzing the concept of 'family' as a constitutional value, this concept assumes the protection of a complex social reality which is the sum of relations linking mainly parents and children (although in a broader sense the concept of family should also include other relations arising from blood ties or adoption)"[103]. In more recent jurisprudence, it also emphasized twice that, **"family life should be understood as a set of relations between spouses and persons who are related by kinship or affinity"**[104].

The family is also mentioned in Art. 71 sec. 1 sentence 1 of the Polish Constitution, according to which "the state in its social and economic policy takes into account the good of the family". The jurisprudence indicates that "Art. 18 is an expression of the same axiology that inspired the contents of Art. 71 of the Constitution" and "**orders the state to undertake such activities that strengthen the ties between the persons making up the family, and in particular the ties existing between parents and**

100 Judgment of the Constitutional Tribunal dated January 27, 1999, file ref. no. K 1/98
101 Judgment of the Constitutional Tribunal dated November 26, 2013, file ref. no. P 33/12
102 M. Wild, *Commentary to Art. 47 of the Polish Constitution* [in:] *Constitution of the Republic of Poland. Vol I. Commentary to Art. 1–86*, red. M. Safjan, L. Bosek, Warsaw, 2016
103 Ruling of the Constitutional Tribunal dated May 28, 1997, file ref. no. K 26/96
104 Judgment of the Constitutional Tribunal dated January 21, 2014, file ref. no. SK 5/12; judgment of the Constitutional Tribunal of September 30, 2015, file ref. no. K 3/13

children as well as between spouses". In the cited judgment, the Constitutional Tribunal found that the provisions of the Act on family benefits are inconsistent with the Constitution, which privileged single parents by granting them benefits to family allowance on this basis. The CT referred to the disastrous effects of the challenged provisions, which increased the number of applications for separation or divorce, and "the mere filing of a request for separation or divorce is evidence weakening ties between the spouses"[105].

Currently, the Parliament of the Republic of Poland is working on a draft act on pro-family policy for local government units, submitted on January 4th, 2021. Art. 2 point 1 of the draft act defines the family as, "**a community of persons related by kinship, affinity, adoption or marriage** concluded in accordance with Art. 1 of the Act of February 25th, 1964 – Family and Guardianship Code (Journal of Laws for 2020, item 1359)"[106]. Naturally, at this stage, it does not yet represent a binding legal act, but it constitutes an important point of reference as an attempt to transfer to the statutory order the definition specified so far only by the Constitutional Tribunal. The four foundations that make up a family are clearly indicated here:

a. Kinship,
b. Affinity,
c. Adoption,
d. Marriage.

Thus, the constitutional model of the family clearly does not provide for the term "family" to be used in reference to concubinages, including both informal mixed-sex and same-sex relationships. The concept of the "rainbow family", which the lobbyists of radical ideologies are trying to introduce into the legal discourse, is internally inconsistent under Polish law and contrary to the nature of the "family" as a concept established by the Polish legislator. People who are not related to each other by kinship, affinity, adoption, or marriage are not a family.

5.2. Marriage understood solely as a union between a man and a woman

Article 18 of the Polish Constitution underlines that marriage is "a relationship between a woman and a man". Contrary to the theses of lobbyists representing radical ideologies, this definition excludes understanding this concept other than in heterosexual terms. The necessity of a sexually different nature of marriage was also mentioned in the jurisprudence of the Constitutional Tribunal: "**Marriage (as a union of a woman and a man) obtained a separate constitutional status in the domestic law of the Republic of Poland determined by the provisions of Art. 18 of the Constitution. A change in this status would be possible only under the rigors of the procedure of changing the Constitution**, specified in Art. 235 of this act"[107]. Moreover, "the only normative element that can be decoded from Art. 18 of the Constitution is the establishment of the principle of heterosexuality of marriage"[108].

105 Judgment of the Constitutional Tribunal dated May 18, 2005, file ref. no. K 16/04
106 Parliamentary draft act on pro-family policy of local government units, "Self-government for the Family", https://www.sejm.gov.pl/Sejm9.nsf/druk.xsp?nr=869, access: 21.09.2021.
107 Judgment of the Constitutional Tribunal dated May 11, 2005, file ref. no. K 18/04.
108 Judgment of the Constitutional Tribunal dated November 9, 2010, file ref. no. SK 10/08.

At the same time, the Constitutional Tribunal reminds us of the essence of the institution of marriage – **the state protects marriage not to ensure mutual pleasure, joy or happiness of two people, but to "ensure that marriage, and the family on which it is based on, can optimally perform the functions recognized by the legislator as the most important for society, which is, above all, the procreative and socializing-caring functions. [...] The right to decide about one's personal life (Article 47 of the Constitution) is not absolute in nature**. This would entail that the rights and freedoms of others would no longer prevail, along with the protection of public order consisting in providing marriage and family with **the best possible implementation of society's essential functions** and, above all, ensuring the protection of the best interests of the child"[109].

The issue of marriage was the subject of lively discussion during the adoption of the Constitution of the Republic of Poland. It is reasonable to quote its fragments here which make it possible to unequivocally establish that the actual intention of the legislator was to ensure the marriage of a purely heterosexual nature and to provide protection so extensive that it would be unacceptable to enact an attractive alternative to marriage in the form of a registered "partnership".

On April 4, 1995, during a meeting of the Constitutional Committee of the National Assembly, expert Piotr Winczorek explained that **"the point is to exclude marriages other than a relationship between a woman and a man. [...] It is an existing concept that has been functioning in the legal culture since Roman times. So if we stick to the existing concepts, I do not think that there could be a marriage other than between a man and a woman"**[110]. Senator Piotr Andrzejewski, on the other hand, drew attention to **"the sense of limiting marriage to such a scope that results from natural law or from law that is not questioned in Poland today.** On the other hand, *de lege ferenda*, it may turn out that **if we adopt the provision on marriage, without explaining what it concerns, it may be interpreted freely. [...] Since we are writing the Constitution not only on the basis of a certain axiology, but also on the basis of a certain time perspective, I want to give a clear view that will protect us against arbitrary and over-reaching interpretations"**[111].

During the session of the National Assembly on February 24th, 1997, this topic was raised again by senator Alicja Grześkowiak: **"It is therefore necessary to clarify that marriage includes a union of a woman and a man in order to exclude the possibility of marriages by persons who have natural obstacles for its conclusion, for example by two women or two men"**[112]. She also continued it during the next part of the meeting, on February 27th: "I propose that **marriage is a union of a man and a woman, and only as such a union becomes a constitutional value. This would make it impossible to introduce into the law, through a side gate or directly, the possibility of entering into relationships between people who show natural obstacles to marriage, that is, two women or two men"**[113]. MP Aleksander Bentkowski made a reservation that **"if we do not include this provision, it will be**

109 Judgment of the Constitutional Tribunal dated November 22, 2016, file ref. no. K 13/15.
110 Session of 4 April 1995, Bulletin of the Constitutional Committee of the National Assembly, no. XVII, Warsaw 1995, p. 31, https://bs.sejm.gov.pl/exlibris/aleph/a22_1/apache_media/DDNEBMFGB28MFMXQPE1X6EJF2FD3E6.pdf, access: 21.09.2021.
111 Ibidem, p. 32.
112 A. Grześkowiak, statement at the session of the National Assembly on February 24, 1997, http://www.sejm.gov.pl/Sejm7.nsf/wypowiedz.xsp?posiedzenie=zn3&dzien=1&wyp=022&kad=2, access: 21.09.2021.
113 A. Grześkowiak, statement at the session of the National Assembly on February 27,1997, http://www.sejm.gov.pl/Sejm7.nsf/wypowiedz.xsp?posiedzenie=zn3&dzien=4&wyp=024&kad=2, access: 21.09.2021.

possible to assume that we allow other marriages. Therefore, I think that this amendment should also find recognition, first among members of the Constitutional Committee, and then in a wide body of the National Assembly"[114].

The Supreme Court also stated that, "due to the constitutional principle of the protection of marriage and the absence of grounds for recognizing the lack of legal regulation of extramarital affairs as a loophole in the law, it is unacceptable to apply provisions in the field of marriage law (including joint property and division of property), even by way of analogies to relationships other than marriage characterized by the existence of personal and property ties"[115].

5.3. Parents' right to raise their children according to their conscience

The right to raise children in accordance with their own convictions and to provide them with such an upbringing was confirmed in Art. 48 sec. 1 and art. 53 paragraph 3 of the Polish Constitution as a personal right of parents. Its fundamental importance has been emphasized many times by the Constitutional Tribunal[116]. The Tribunal even recognized that parents have a **subjective right** to raise their children[117]. The doctrine also mentions the following from Art. 48 sec. 1 sentence 1 of the Constitution of the Republic of Poland, **"constitutional freedom"**[118] consisting in the prohibition of interference by third parties, including public authorities, in the legally protected sphere of parents' conduct. It is noted that, "the right to raise a child according to one's beliefs is in practice **the most fundamental parental right"**[119].

The priority of parents in bringing up their children is also confirmed by international agreements ratified by Poland. Among them, the following should be mentioned firstly:

- Universal Declaration of Human Rights of December 10th, 1948. In accordance with Art. 26 sec. 3, "Parents have a prior right to choose the kind of education that shall be given to their children".

- The International Covenant on Civil and Political Rights of December 19, 1966 (Journal of Laws 1977 No. 38, item 167), which protects the priority of parents to raise their children in Art. 18 sec. 4, stating that the parties „undertake to respect the freedom of parents or, in appropriate cases, legal guardians to provide their children with religious and moral education in accordance with their convictions";

114 A. Bentkowski, statement at the session of the National Assembly on February 27, 1997, http://www.sejm.gov.pl/Sejm7.nsf/wypowiedz.xsp?posiedzenie=zn3&dzien=5&wyp=076&kad=2, access: 21.09.2021.

115 Judgment of the Supreme Court dated December 6, 2007, file ref. no. IV CSK 301/07.

116 Judgment of the Constitutional Tribunal of November 15, 2005, file ref. no. P 3/05, in which the Tribunal emphasized that, "the Constitution requires that, in accordance with the principle of subsidiarity, the broadest possible autonomy of parents in exercising parental functions, including in particular educational functions, for the best interests of the child (Art. 47, Art. 48, Art. 53 (3) of the Polish Constitution). The regulations were shaped in this fashion to ensure the protection of the constitutional rights of parents against any and arbitrary interference by public authorities. Therefore, parents should have a decisive influence on this dimension of teaching".

117 Judgment of the Constitutional Tribunal dated October 11, 2011, file ref. no. K 16/10 and of 21 January 2014, file ref. no. SK 5/12.

118 *Constitution of the Republic of Poland. Vol. I. Commentary to Art. 1–86*, red. M. Safjan, L. Bosek, 2016.

119 Ibidem.

- The European Convention on Human Rights of 4 November 1950. The parents' right to determine the form of upbringing for their children results from Art. 2 of Protocol No. 1 to the ECHR, which is evidenced by the „right to education" contained in this provision. According to sentence 2 of this provision, "In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions".

5.4. The child's right to be protected against demoralization

Attention should be paid to the parts of the declaration expressing opposition to people "interested in the early sexualization of Polish children in accordance with the so-called World Health Organization (WHO) standards". It is worth noting that, in accordance with § 1 of the Regulation of the Minister of National Education of August 12th, 1999, **the contents of knowledge about human sexual life, shown in an integral way, contained in the core curriculum of general education, are carried out as part of the course "Education for life in the family"**. The regulation does not provide for exceptions to this state of affairs. In light of § 2 of this regulation, **the implementation of the curriculum in the classes should constitute a coherent supplement to the remaining educational and preventive tasks of the school, and in particular, support the educational role of the family, promote an integral approach to human sexuality, and shape pro-family, pro-health, and pro-social attitudes**. The model of transferring knowledge in the field of sexuality adopted by the legislator is an expression of a specific axiological preference stemming from the Constitution of the Republic of Poland. It is an expression of a specific, personalistic anthropological vision in which the human being is perceived in a holistic way, irreducible to the biological dimension.

The model of extremely permissive, vulgar sexual "education", presented in the so-called WHO standards [120], remains clearly contradictory to these assumptions, and its reading[121], allows for a legitimate claim that it contributes to the decomposition of the education system defined by generally applicable acts of law, with which the declarations of local government officials fully comply.

5.5. Poland's sovereignty in the field of marriage and family law

Article 9 of the Charter of Fundamental Rights of the European Union expressly states that, "the right to marry and the right to establish a family shall be **guaranteed in accordance with the national laws** governing the exercise of these rights". It does not therefore follow from an obligation for

120 WHO Regional Office for Europe and BZgA, *Standardy edukacji seksualnej w Europie. Podstawowe zalecenia dla decydentów oraz specjalistów zajmujących się edukacją i zdrowiem*, https://www.icmec.org/wp-content/uploads/2016/06/WHOStandards-for-Sexuality-Ed-in-Europe.pdf , access: 21.09.2021.

121 According to WHO standards, sex educators should convey to children under the age of 4 such content as "the joy and pleasure of touching your own body", "early childhood masturbation", and "discovering your own body and sexual organs", children aged 4 to 6 years old are to explore the subject of same-sex relationships, and from 6 to 9 years old they are to be taught about different methods of contraception, learn about "sex in the media (including the Internet)" and develop their "satisfaction and pleasure from touching one's own body (masturbation / auto-stimulation)". The next steps are to educate children aged 9 to 12 about the topics "pleasure, masturbation, orgasm", "effective use of condoms and contraceptives", "love for people of the same sex" or "differences between gender identity and biological sex" and finally, "first sexual experiences" (it should be recalled that these are children under 12 years of age!), aged 12 to 15: "gender identity and sexual orientation, including 'coming out' / homosexuality", "pregnancy (also in same-sex relationships), infertility, termination of pregnancy, contraception, emergency contraception, and information on contraception counseling services". The ultimate goal of "sexual education" conducted in this way takes place at the age of 15, when such a formed young person should achieve a specific worldview change: "change possible negative feelings, disgust and hatred towards homosexuality into acceptance of sexual differences", be aware of the existence of "related sex with the exchange of economic goods (prostitution, sex for gifts or meals)", and to express "openness to various types of relationships and lifestyles"; ibidem.

another Member State to recognize same-sex unions equated to marriage. Even if in the future such a provision was entered into the Charter, the imposition of such an obligation on Poland would be unequivocally ruled out by the so-called Polish-British Protocol (No. 30) to the Charter of Fundamental Rights, according to which the Charter does not extend the powers of the Court of Justice of the European Union or any Polish court to find that Polish provisions are inconsistent with the provisions of the Charter[122]. Poland also submitted its own declaration to the Charter (No. 61), ensuring that, "the Charter in no way infringes the right of the Member States to legislate in the field of public morality, **family law**, and the protection of human dignity and respect for human physical and moral integrity"[123]. Earlier, a similar declaration (No. 39) was made by Poland to the Accession Treaty in 2003: "nothing in the provisions of the Treaty on European Union, the Treaties establishing the European Communities, or in the provisions of the treaties amending or supplementing these treaties shall constitute an obstacle for the Polish State in regulating issues **of moral importance** as well as matters relating to the protection of human life"[124].

It should be emphasized that the sovereignty of the Polish state with regard to the institution of family law has been clearly declared also on the basis of the resolutions announced by the Parliament of the Republic of Poland – legally non-binding, but having a significant impact as a moral obligation and an important indication in decoding the real intentions of the legislator delegating some powers to the institutions of the European Union. Already two months before the accession referendum, the Polish Parliament adopted a resolution of April 11th, 2003 on the sovereignty of Polish legislation in the field of morality and culture in which it was clearly stated that, **"Polish legislation in the field of moral order social life, the dignity of the family, marriage and upbringing, and the protection of life is not subject to any restrictions by international regulations"**. This position was then repeated in the resolution of April 1st, 2008 on the consent to the ratification of the Lisbon Treaty, „The Charter of Fundamental Rights of the European Union in no way infringes **the right of the Republic of Poland to legislate in the field** of public morality, **family law**, as well as the protection of human dignity and respect for the physical and moral integrity of man") and the resolution of May 27th, 2011, **"The purpose of the treaty is not to transfer the regulation of substantive family law concerning partnerships with EU countries that have introduced such regulations in their internal legislation in recent years, to countries that do not provide for similar legal structures** (including Poland, where protection of marriage, as a union of a woman and a man, is a principle expressed in Article 18 of the Constitution). The Polish Parliament is of the opinion that **the European Union does not have the power to adopt provisions relating to substantive family law, in particular provisions which result in the establishment of partnerships governed by the law of the state of registration in countries not providing for such a legal institution"**).

122 Protocol (No 1) (to the Treaty on the European Union) on the role of National Parliaments in the European Union.

123 Consolidated version of the Treaty on the Functioning of the European Union - Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007 - A. Declarations concerning provisions of the Treaties - 17. Declaration concerning primacy, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12008E%2FAFI%2FDCL%2F17, access: 21.09.2021.

124 Official Journal of the European Union, L 236, vol .46, 23 September 2003, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AL%3A2003%3A236%3ATOC, access: 21.09.2021.

6. Summary

Most of the deputies to the European Parliament seem determined to seek punishment for Poland for adopting pro-family resolutions, even in the absence of real legal grounds for such action. This determination is indicated by four resolutions adopted by the EP since 2019, containing false information about Poland, the situation of people with homosexual tendencies or gender identity disorders in Poland, a declaration of opposition to the "LGBT ideology" and the Local Government Charter of Family Rights. Although no Polish local government has in fact established any "zone" free from any individuals or groups of people, and most administrative courts have found declarations of opposition to the "LGBT ideology" lawful. Some Western politicians who have influenced the adoption of this type of resolution, still prefer to rely on the anti-Polish propaganda of left-wing extremists over a thorough analysis of the facts.

It is worth expressing hope that officials of the European Commission, as professionals, will not follow such reprehensible models in the course of the ongoing proceedings, and will patiently exchange communication with representatives of the Polish government.

The reaction to the ongoing proceedings of the Secretary of State in the Ministry of Funds and Regional Policy, who mistakenly identified the discussed declarations of opposition to the "LGBT ideology" with the LGCFR, should be considered absolutely inappropriate. The Local Government Charter of Family Rights, as a document which does not contain a single reference to the LGBT movement, is a safe alternative to the other resolutions which – although, as it has been shown, do not have a discriminatory nature – are controversial in the eyes of Western politicians. A valuable point of reference is the case of the City Council in Wilamowice, which – in response to similar allegations – by Resolution No. XXXII / 246/21 of April 30th, 2021, repealed Resolution No. XIV / 83/19 of October 30th, 2019 on the "support for the constitutional family model based on traditional values" (which contained the statement that the representatives of LGBT communities undermined the concept of the family model), **replacing it with the Local Government Charter of Family Rights, which allowed the city to keep subsidies from the Norwegian Funds**[125]. The representatives of the Kingdom of Norway did not find any wording in the LGCFR that would substantiate the withdrawal of funds. It should be expected that also representatives of the European Commission would find such a change satisfactory.

Regardless of this particular case, however, it should be remembered that **none of the 40 resolutions adopting the LGCFR have ever been effectively appealed against to the Provincial Administrative Court**. The contents of the LGCFR have never been the reason for the resolution to be declared invalid by any of the voivodes. To facilitate the implementation of the proposed solutions, experts from the Ordo Iuris Institute have prepared **a multi-page guide, "How to implement the Local Government Charter of Family Rights?"**[126]. The full compliance of the LGCFR with the Constitution of

125 *Wilamowice retained PLN 7 million from the Norwegian Funds thanks to the adoption of the Local Government Charter of Family Rights*, 07.05.2021, https://ordoiuris.pl/rodzina-i-malzenstwo/wilamowice-zachowaly-7-mln-zl-dzieki-przyjeciu-samorzadowej-karty-praw-rodzin, access: 21.09.2021.

126 *A compendium of knowledge for pro-family local governments. Ordo Iuris Guide to the Local Government Charter of Family Rights*, 07.05.2020, https://ordoiuris.pl/rodzina-i-malzenstwo/kompendium-wiedzy-dla-prorodzinnych-samorzadow-przewodnik-ordo-iuris-na-temat, access: 21.09.2021.

the Republic of Poland was also confirmed by recognized constitutionalists – prof. Anna Łabno [127] and dr hab. Jacek Zaleśny[128]. The individual solutions of the document were met with the **approval of a group of deputies to the Polish Parliament, who in January 2021 submitted the draft law "Self-government for the Family"**[129], currently awaiting its first reading.

There are alternative proposals in the public debate, aimed at reformulating the declaration. As an example, it is worth mentioning the postulate of prof. Jan Tadeusz Duda, to replace the phrase "LGBT ideology", which arouses so many misunderstandings in the West, with the phrase "neo-Marxist ideology of cultural sexuality", which is somewhat more complicated, but more accurately reflects the essence of the matter"[130]. Contrary to this proposal, the solution of replacing the declaration of objection to the "LGBT ideology" with the Local Government Charter of Family Rights is a proven and safe method.

127 A. Łabno – opinion on compliance with the Constitution of the Local Government Charter of Family Rights, 21.01.2021, https://ordoiuris.pl/rodzina-i-malzenstwo/prof-dr-hab-anna-labno-opinia-o-zgodnosci-z-konstytucja-samorzadowej-karty, access: 21.09.2021.

128 J. Zaleśny – opinion on constitutionality of the Local Government Charter of Family Rights, 21.01.2021, https://ordoiuris.pl/rodzina-i-malzenstwo/dr-hab-jacek-zalesny-opinia-o-zgodnosci-z-konstytucja-samorzadowej-karty-praw, access: 21.09.2021.

129 The parliamentary draft act on pro-family policy of local government units "Self-government for the family", https://www.sejm.gov.pl/sejm9.nsf/druk.xsp?nr=869, access: 21.09.2021.

130 A. Pitoń, *President Duda's father has an idea how PiS will outplay the European Commission: „We will replace the word LGBT with a neo-Marxist ideology of cultural sexuality"*, https://krakow.wyborcza.pl/krakow/7,44425,27542373,ojciec-prezydenta-dudy-ma-pomysl-jak-pis-ogra-komisje-europejska.html, access: 21.09.2021.

06

"Response to the position of the Judges of England and Wales on the reform of the Polish judiciary"

Main theses:

1. The position of the Judges' Council of England and Wales (JCEW) published on Monday, May 8, negatively assessed the reform of the Polish judiciary proposed by the Council of Ministers. However, the authors of the document did not avoid significant errors that call into question the reliability of their assessment.

2. JCEW's position is brief and refers only to selected aspects of the proposed changes. It does not assess whether and what reforms are needed in the Polish judiciary at all, and no reference was made to the proposals to strengthen the independence of judges vis-à-vis court presidents (such as the compulsory draw of adjudicating benches). For this reason as well, it is difficult to treat them even as a starting point for a serious discussion, which should focus on specific provisions of the project – and not only media reports about them.

The position of the Judges' Council of England and Wales (JCEW) published on Monday, May 8, negatively assessed the reform of the Polish judiciary proposed by the Council of Ministers. However, the authors of the document did not avoid significant errors that call into question the reliability of their assessment.

Firstly, the entire reform contained in several bills and assumptions to bills was reduced to a few (negatively reviewed) changes, disregarding the legal, historical, and political context in which the Polish justice system functions. Moreover, the solutions that have long been present in the Polish political system (albeit to a slightly different extent), as well as in the law of other EU countries - including the United Kingdom itself, have also been described as harmful.

* * *

According to the JCEW, the greatest threats to the independence of the judiciary result from the following solutions:

1. possible dismissal of all presidents and vice presidents of common courts, and then appointment of new presidents by the executive authority;

2. establishing disciplinary chambers composed of representatives of the public; and

3. dismissal of the Presidents and a significant number of Supreme Court judges

Although the details of the reform are worth discussing, it is impossible to agree with the accusations of English and Welsh judges.

* * *

The first of the criticized solutions – i.e. granting the Minister of Justice the power to appoint and dismiss court presidents (and vice-presidents) – is present in Art. 23 and 24 of the Act of 27 July 2001 – Law on the System of Common Courts (Journal of Laws No. 98, item 1070) from the moment of its adoption; it was also in force for many years under the previous law of 1985. Currently, this power extends to the presidents (and vice-presidents) of appellate and regional courts – i.e. those that hear the most important cases. The proposed amendment also extends this power to district courts (currently their presidents and vice-presidents are appointed by presidents of courts of appeal). Thus, the principle does not change – only the scope of its application.

The fact is that the draft restricts the powers of the National Council of the Judiciary. So far, if it were to express a negative opinion, the Minister of Justice could not dismiss the president (or vice-president) of the court; according to the amendment, such an opinion will not be binding. This solution can be assessed negatively in itself: it will undoubtedly give the executive a means of putting pressure on the presidents of courts. However, it is unlikely that this emphasis would relate to the sphere of adjudication – the proposed amendment introduces as a rule (with only minor exceptions) a random selection of adjudicating panels in all types of cases. Rather, it seems that the pressure – if anything – could translate into issues of the organization of the work of the court, but not the adjudicative process of and by the judges.

The introduction of the principle of randomly assigning cases basically deprives any person – be it the Minister of Justice or the president of a given court – of influence on which judges will pass their sentences. Currently, it differs depending on the type of proceedings: while criminal cases are assigned according to an alphabetical list, civil cases are assigned by the heads of divisions, guided by the principle of even distribution of cases between individual judges.

Both methods are imperfect – because the parties to the proceedings in principle have no way of checking whether the allocation was made in accordance with these rules. In criminal cases, it is

possible, but in practice it is quite difficult: first you need to obtain a list of judges and cases heard by them from the court registry, and then check whether the allocation was correct. Considering the number of cases brought to the courts (a dozen or several dozen a day), this verification is difficult – especially since the act provides for exceptions to the principle of allocating cases in accordance with the alphabetical order (e.g. a judge's illness, vacation, business trip).

In civil cases, verification is even more difficult: if the head of the division for some reason wants to assign a given case to a particular judge, it is difficult to accuse him of doing so against the principle of equality. Since even several dozen new cases are submitted to the court every day, the presiding judge can assign each of them to the judge he wants - and it is difficult to accuse him of any irregularity.

The introduction of the random allocation of cases as a rule, with the obligation to attach the minutes of this draw to the case file, is undoubtedly a step in the right direction. This will in principle rule out any possibility of influencing the composition of the court by third parties – and will increase the independence of individual judges.

Considering how long it takes in Poland to obtain legally binding judgments in court cases, the organization of the work of courts certainly requires far-reaching changes. The proposals presented by the Ministry of Justice are certainly not perfect (they lack, for example, proposals to create a system streamlining the organization of the work of court secretariats and the circulation of documents), but the changes themselves do not mean that the executive will be able to influence the contents of the judgments. The allegation contained in the JCEW position is therefore completely unfounded.

* * *

The participation of the social factor in the administration of justice is guaranteed by the provision of Art. 182 of the Polish Constitution. In this light, it is impossible to negatively evaluate the second solution criticized by judges from England and Wales. On the contrary: it is rather the current legal status, according to which judges themselves adjudicate on the offenses of their colleagues, without the participation of representatives of the public, should be assessed as incorrect.

The harsh criticism of the participation of citizens in the administration of justice contained in the JCEW statement is quite astonishing, especially since its authors come from a country with an established tradition of jury courts. The Anglo-Saxon legal system empowers the public to influence the contents of judgments far more than the dominant system in continental Europe – and while the faults and merits of each may be debated, none poses a threat to judicial independence.

It is worth noting that in Great Britain disciplinary proceedings against judges also take place with a significant contribution from the social factor. Pursuant to the provision of Art. 11 of the British Rules of Disciplinary Liability of Judges of 17 July 2014, the panel conducting the proceedings always includes – apart from two judges – two other persons, neither of whom can not only be a judge, but even a lawyer at all. It is all the more difficult to understand why the introduction of a similar (and much closer) regulation to Polish law is assessed negatively.

The Ministry of Justice has been announcing for several months now a proposal to establish a separate disciplinary chamber at the Supreme Court, which would include – apart from judges –ordinary citizens, but so far no bill has been presented. Although it is difficult to comment on the details of this idea in this situation, it undoubtedly deserves praise, not criticism.

* * *

JCEW's third objection finds no support in the bills presented so far. Neither of them provides for the dismissal of the Presidents of the Supreme Court or any of its judges.

Most likely, the authors of the document refer to the proposals in the media to lower the age at which judges will automatically retire. Currently, it is 70 years for Supreme Court judges and 67 years for common court judges, but it can be increased to 72 and 70 years, respectively. The condition is that the judge concerned expresses the will to continue to perform the function and presents a certificate of good health.

The draft act amending the system of common courts slightly modifies this issue – according to it, the Minister of Justice will have to agree to postpone the retirement. And this solution is similar to British legislation - pursuant to Art. 26 (6) of the Act on Retirement and Retirement Benefit of Judges of 1993, if a judge wishes to continue his office after reaching 70 years of age, he or she is required to obtain the consent of the relevant authority.

There is, of course, some debate as to what age is appropriate for the compulsory retirement of judges. However, this issue should be analyzed mainly from a medical rather than a legal perspective. However, if this age were to be lowered (although – as already indicated– there is no such project at present), it is difficult to treat it as an action threatening the independence of the judiciary. The age criterion is objective and applies equally to all judges – both those who would allegedly be criticized by the Minister of Justice, and those who would be assessed positively.

* * *

JCEW's position is brief and refers only to selected aspects of the proposed changes. It does not assess whether and what reforms are needed in the Polish judiciary at all, and no reference was made to the proposals to strengthen the independence of judges vis-à-vis court presidents (such as the compulsory draw of adjudicating benches). For this reason as well, it is difficult to treat them even as a starting point for a serious discussion, which should focus on specific provisions of the project – and not only media reports about them.

However, if English and Welsh judges provide a detailed opinion on the effects of the changes proposed by the Ministry of Justice, it will undoubtedly be worthwhile to engage in such a discussion.

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