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Warsaw, 19 November 2021

On 20 July 2021, the European Commission published the 2021 Rule of Law Report. *The rule of law situation in the European Union* [SWD (2021) 722 final]. As it has been declared by its authors, the 2021 Report addresses the new developments since September 2020, aiming at deepening the assessment of issues identified in the previous report and taking into account the impact of the COVID-19 pandemic.

The European Commission underlines, that the Report is at the centre of the Rule of Law Mechanism. The Mechanism is a yearly cycle to promote the rule of law and to prevent problems from emerging. The main purpose of the document is to focus on the improvement of understanding and the awareness of the issues at stake and to present significant developments. Its role is to identify the rule of law challenges helping the Member States to identify solutions with the assistance from the Commission and other Member States.

These ambitious goals are essential for consolidating and developing one of the core values of the European Union, which the rule of law is. Their implementation is possible by means of dialogue and exchange of best practices. However, it is only possible if the country reports are based on reliable data allowing for a proper assessment of the specific situation in each Member State.

The Country Chapter on the rule of law in Poland raises in this respect, numerous doubts and hardly corresponds to the facts. Therefore, I have considered it necessary to present by virtue of Article 14 (1) of the Supreme Court Act (2017) following comments on the Report addressing the constitutional position of the Supreme Court and the Polish judiciary. The following comments consist of excerpts from the systematic assessment of the Report in the above-mentioned scope and some explanation for better understanding each other in the future.

The paper, and the remarks herein included, demonstrates our commitment to the dialogue on the rule of law in the scope of the Supreme Court's constitutional competences under Article 183 (1) of the Polish Constitution. At the same time, it is the reply to the European Commission's invitation to intensify national debates on the basis of the Report by the relevant public authorities within the scope of their authority.

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The First President of the Supreme Court

EUROPEAN
COMMISSION

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COMMISSION STAFF WORKING DOCUMENT

with comments by the Supreme Court of the Republic of Poland

2021 Rule of Law Report
Country Chapter on the rule of law situation in Poland

Accompanying the

COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS

2021 Rule of Law Report
The rule of law situation in the European Union

ABSTRACT

The reforms of the Polish justice system, including new developments, continue to be a source of serious concerns as referred to in 2020.

Comment:

The organization and operation of the judiciary does not fall under the exclusive, shared, or complementary competences of the Member States of the European Union.

According to the Article 4 (2) (j) shared competence between the Union and the Member States apply also to the area of freedom, security and justice. However, this provision cannot be interpreted as conferring the competence to organize the administration of justice of the Member States. In the CJEU case-law it is emphasized that although the organization of the judiciary in the Member States falls within the competence of the latter, when exercising this competence, the Member States are obliged to comply with their obligations under EU law (see: Judgement of the CJEU (Grand Chamber), 20 April 2021, *Repubblika v Il-Prim Ministru*, C-896/19, p. 48). According to Article 2 (2) TFEU when the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence. However, the norms defining the EU's activity in a given area defined as shared must have a clear treaty basis and result from the process of making, and not applying, the law.

Reforms carried out since 2015 increased the influence of the executive and legislative powers over the justice system to the detriment of judicial independence and led the Commission to launch the procedure under Article 7(1) TEU, which is still ongoing.

Comment:

A serious flaw in the Report consists in the general nature of its theses.
This gives the impression of manipulating facts and presenting issues in a slogan manner, without any discussion of a specific problem in an analytical manner.

As an example, serious abuse appears at the very beginning of the document, where it was indicated that "multiple aspects of the justice reform raise serious concerns as regards the rule of law […]. This is the main focus of the Article 7(1) TEU procedure initiated by the Commission, which remains under consideration by the Council". Meanwhile, the procedure concerns only strictly defined aspects of the reforms, and not their entirety.

In April 2021, the Commission referred Poland to the Court of Justice in view of a law on the judiciary which undermines the independence of judges and is incompatible with EU law. In July 2021, the Court ordered interim measures in that case. On the same day, the Constitutional Tribunal held that interim measures ordered by the Court of Justice in the area of the judiciary are inconsistent with the Polish constitution.

Comment:

In terms of assessing the competences and boundaries of EU institutions, including the CJEU, see - for example - two judgements of the Federal Constitutional Court (Germany) of 30 June 2009 (reference number 2 BvE 2/08) or the decision of 21 June 2016, reference number 2 BvR 2728/13.

The scope of competence in the field of making and applying the law transferred to EU institutions may and sometimes must be assessed by national judicial authorities in order to define a clear boundary and the rules for applying the law. These nuances are completely ignored in the Report and the organization of the judiciary is treated in this document in a broader way than resulting from its status as a competence shared between the Member State and EU institutions.

Also in July 2021, the Court of Justice found that the disciplinary regime for judges in Poland is not compatible with EU law. The National Council for the Judiciary continues to operate despite its contested independence and the functioning of the Supreme Court was further affected, including by changes in legislation. In May 2021, the European Court of Human Rights found irregularities in an appointment procedure to the Constitutional Tribunal.

The legal and institutional framework to prevent and combat corruption is largely in place. Yet, there are risks as regards the effectiveness of the fight against high-level corruption, including a risk of undue influence on corruption prosecutions for political purposes. In this context, concerns remain over the independence of the main institutions responsible for the prevention and fight against corruption, considering in particular the subordination of the Central Anti-Corruption Bureau to the executive and the fact that the Minister of Justice is also the Prosecutor-General. The dedicated government anti-corruption programme was implemented in the years 2018-2020, yet key legislative tasks remain unfinished. Structural weaknesses continue to exist as regards the asset declaration system and lobbying.

Regarding media freedom and pluralism, the Government is expected to adopt legislation to transpose the Audiovisual Media Service Directive to strengthen the independence of media regulators. The Polish media market has been so far considered diverse, but stakeholders fear negative impacts of the acquisition of Polska Press by the state-owned company Orlen. While the competition authority (UOKiK) approved the transaction, the Polish Ombudsperson challenged this decision considering that this authority did not examine whether the acquisition would result in restricting press freedom. Concerns were also raised about a draft tax legislation targeting some media groups, in an environment considered as increasingly unwelcoming towards foreign-owned media outlets. Since 2020, journalists' professional environment has deteriorated, with use of intimidating judicial proceedings, growing failure to protect journalists and violent actions during protests, including from police forces.

The system of checks and balances continues to be under considerable pressure. The expedited adoption of legislation continues to be used, also beyond issues linked to the COVID-19 pandemic, including for structural reforms of the judiciary, with no or limited consultation of stakeholders. Some measures introduced by the Government in 2020 to address the COVID-19 pandemic have been considered unlawful by courts in individual cases. The Ombudsperson continues to play a key role as a rule of law safeguard. Following a decision of the Constitutional Tribunal, the continued exercise of core powers by the outgoing Ombudsperson ended in July 2021. Parliamentary proceedings now point to an appointment of a new Ombudsperson with

cross-party support. The civil society space is still vibrant but has been affected further by general problems concerning women's rights, and by attacks on LGBTI groups.

I. JUSTICE SYSTEM

The Polish justice system is separated in two main branches, administrative and ordinary judiciary. The Supreme Administrative Court and 16 administrative courts exercise control over public administration, including the lawfulness of measures of bodies of local government and of territorial organs of government administration. The ordinary judiciary, supervised by the Supreme Court, consists of three levels: 11 appeal courts, 46 regional courts, and 318 district courts. Judges are appointed by the President of the Republic at the request of the National Council for the Judiciary. The Constitutional Tribunal, which adjudicates notably on the constitutionality of legislation, is composed of 15 judges chosen by the Sejm (lower chamber of the Parliament) for a term of office of 9 years. The National Council for the Judiciary is tasked by the Constitution to safeguard judicial independence. A particular characteristic of the prosecution system, which is not part of the independent judiciary, is that the Prosecutor General and the Minister of Justice are the same person. The Constitution provides that advocates and legal counsellors can self-regulate their practice.

Independence

The perception of judicial independence among the general public and companies is low and continues to decrease. Whereas in 2021 29% of the general public perceives independence of courts and judges as 'fairly or very good', only 18% of companies share the same perception.

Comment:

Critical remarks are raised by the fact that the sources given in the Report are mostly of journalistic origin and are not appropriate for a reliable analytical study of the legal services of public authorities, not to mention a scientific study.

It is regrettable to say that in several places the cited data reveal errors in the analysis and even manipulation of statistical data. For example, it is stated that "in 2021 29% of the general public perceives independence of courts and judges as 'fairly or very good', only 18% of companies share the same perception" - which is a classic example of a categorical shift error, because fractions from two different samples are compared. In Poland, the low assessment of the judiciary, shared by society, has been present for many years and was even lower than the cited research results. Low assessments of the judiciary by the Polish society were at the highest level at the beginning of the 2000s (e.g. in 2005, a positive assessment was shared by 22% of respondents, and poor by 69%). All analyses also reveal that opinions about the judiciary are mainly shaped by media (in at least 60%) not by the analysis of the rule of law criteria.

The perception of independence has steadily decreased for both the general public and companies during the last five years. As last year, the public debate on the judiciary continues to be marked by strong tensions.

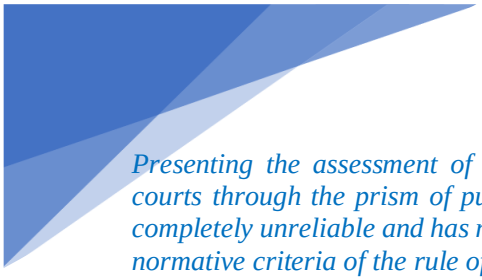
Comment:

The report contains biased assessments. This document does not consider the arguments of both sides of the legal and political dispute in Poland concerning changes in the judiciary.

The Report is based mostly on press materials and superficial media messages. At the same time, it does not refer to applicable law, including those legal provisions which are subject to one-sided evaluation and criticism. Instead, all assessments were made based on sources from media discourse. The rule of law is assessed by reference to the atmosphere of "strong tensions" mentioned in the public debate on the judiciary. This issue has nothing to do with the assessment of compliance with the requirements of legalism and, secondarily, with the rule of law. Sometimes the tense public discourse is an element of a democratic state and may also result from strong, emotional manifestations of both sides of the political dispute. It may also result from the public involvement of a part of the legal community (including judges), which thus violates the principle of abstinence in public statements. However, this aspect was not noticed in the Report.

As regards the smear campaign conducted in 2019 against judges who openly criticised the justice reforms, so far, no judicial decisions have been taken.

Comment:



Presenting the assessment of the independence of courts through the prism of public opinion polls is completely unreliable and has nothing to do with the normative criteria of the rule of law.

The Report mentions the "smear campaign" carried out against judges from 2019. On the other hand, there is no information about statements made by people from the world of politics, science and the judiciary attacking the people holding leading positions in the judiciary and in the Constitutional Tribunal, which should also be called “smear campaign”. The Report admits that the proceedings in these cases are pending. However, there is no clear information that the statements mentioned as "slander" were not adjudicated by civil courts due to the lack of lawsuits. Besides, this issue does not apply to the assessment of compliance with the rule of law in the normative context, at best it concerns the discussion on the limits of freedom of speech.

The justice reforms initiated in November 2015 continue to be implemented on the ground. These reforms were carried out through more than 30 laws relating to the entire structure of the justice system, including the Constitutional Tribunal, the National Council for the Judiciary, the Supreme Court, the ordinary courts, administrative courts, and the prosecution service. Multiple aspects of the justice reform raise serious concerns as regards the rule of law, in particular judicial independence.

Comment:

In the Report the principle of the rule of law and mutual powers of the judiciary are understood - depending on the context and the instrumental need of argumentation - sometimes according to the "Rechstaat" principle, other times according to the concept of "Rule of law".

The principle of the "rule of law" recognized in the continental legal culture differs from the principle of the "rule of law" having its source in Anglo-Saxon legal culture. Both principles have some common meanings, but on other issues they are radically different. Meanwhile, the Report uses such an understanding of the rule of law, which partially differs from the current way of defining this concept in the science of law and the continental legal tradition. As a result, some issues discussed in the Report do not relate strictly to the rule of law. The report on the state of the rule of law should be limited only to those issues that are subject to analysis at the normative level. Instead of this, in the factual sphere the Report is exposed to subjective and ideological judgments and results. This makes it impossible to actually control and evaluate the mechanisms of the rule of law and disturbs the possibility of working out any common position.

This is the main focus of the Article 7(1) TEU procedure initiated by the Commission, which remains under consideration by the Council. Also, the European Parliament reiterated its concerns regarding the situation of the rule of law in Poland in a resolution. The safeguarding of judicial independence in Poland is one of the country-specific recommendations addressed in the context of the 2020 European Semester, which remains to be addressed.

Comment:

This wording raises concerns, since the "recommendations" are not a source of EU law and are not binding on the Member State.

Meanwhile, the Polish Government has openly defied the binding nature of an interim measures order issued by the Court of Justice on 21 May 2021 in a case lodged against Poland for breach of EU environmental law.

The Court of Justice further clarified EU law requirements relating to judicial independence in the Polish context.

Comment:

It is highly disturbing that the Report explicitly states that the Court of Justice of the EU operates outside the powers conferred by the Treaty. It cannot be agreed that in the processes of applying the law, the court specifies normative criteria.

The CJEU cannot create any regulations other than those included in the Treaties. EU institutions must operate within their remit.

On 2 March 2021, the Court of Justice issued a judgment in a preliminary ruling procedure, clarifying the requirements of EU law with respect to judicial appointments to the Supreme Court that took place in 2018. The Court of Justice, while leaving the definitive assessment to the referring court, held that successive amendments to the Polish Law on the National Council of the Judiciary which had the effect of removing effective judicial review of that Council's decisions proposing to the President of the Republic candidates for the office of judge at the Supreme Court are liable to infringe EU law. In that respect, the Court noted that given the decisive role of the National Council for the Judiciary in the procedure of appointment of judges in Poland its degree of independence is relevant for ensuring judicial independence, indicating that the independence of the National Council for the Judiciary is open to doubt. On 6 May 2021, the Supreme Administrative Court implemented the above judgment of the Court of Justice, ruling that the current National Council for the Judiciary, in the procedure for appointing judges, does not provide sufficient guarantees of independence from the executive and the legislature and that, consequently, the Council's resolutions giving rise to appointments to the Criminal and Civil Chambers of the Supreme Court in 2018 are annulled.

Comment:

It is only appropriate to refer - for example - to the judgment of the Supreme Administrative Court of 6th May 2021 file ref. GOK 2/18, in which no such statement is made and the reason for the repeal was different. Additionally, it should be remembered that all the judgments of the Supreme Administrative Court related to one case but were not joined for joint examination. Therefore, in this case, one cannot speak of "a number of other Polish courts".

It is factual error to indicate that "Supreme Administrative Court implemented […] judgment of the Court of Justice, ruling that the current National Council for the Judiciary, in the procedure for appointing judges, does not provide sufficient guarantees of independence from the executive and the legislature".

A number of additional requests for preliminary rulings by various Polish Courts relating to the justice reforms of 2017 and 2018 are still pending before the Court of Justice. On 15 July 2021, in the context of an infringement procedure launched by the Commission, the Court of Justice found that the disciplinary regime for judges in Poland is not compatible with EU law. Notably, the Court of Justice found that the Disciplinary Chamber of the Supreme Court does not provide

all the guarantees of impartiality and independence and is not protected from the direct or indirect influence of the Polish legislature and executive.

Comment:

It should be considered astonishing that jurisprudence is one of the criteria for assessing judicial independence and independence used in the Report.

This measure in no way constitutes a premise for the assessment of independence, in particular at the level of the Supreme Court as a "court of law". This would undermine other judicial appointments, e.g. of people appointed to judicature from other legal professions or science. The doctrine notes that a specific level of migration between the legal professions or science and law practice is desirable due to the values of the rule of law and additionally makes the judiciary staff more flexible, including the judiciary service, which prevents – among others – petrification of possible interpretation customs.

The Commission decided on 31 March 2021 to refer Poland to the Court of Justice in view of concerns related to the law on the judiciary of December 2019. The Commission considers that the contested Polish legislation undermines the independence of Polish judges in breach of Article 19(1) TEU and the primacy of EU law. The law prevents Polish courts, including by threatening with disciplinary proceedings, from directly applying EU law protecting judicial independence as well as from referring questions to the Court of Justice for preliminary rulings. Moreover, the Disciplinary Chamber of the Supreme Court - the independence of which is not guaranteed - continues to take decisions which have a direct impact on judges and the way they exercise their function.

Comment:

It should be clearly noted that this scope of the Chamber's activities was not covered by the CJEU ruling of July 15, 2021, file ref. C-791/19.

The Report also contains a false statement regarding the functioning of the Disciplinary Chamber of the Supreme Court, which adjudicates only in cases concerning the waiver of immunity from judges in the event of a justified suspicion of a crime or a disciplinary tort. The CJEU judgment does not refer to these proceedings.

This includes cases of the lifting of immunity of judges to allow criminal proceedings against them or to detain them, and the consequent temporary suspension from office and reduction of their salary. The mere prospect of having to face proceedings before a body whose independence is not guaranteed creates a ‘chilling effect’ for judges and can affect their own independence. This seriously undermines judicial independence in Poland, effective judicial protection for citizens in Poland and the EU legal order as a whole. The Polish Government

considers that the Commission is exceeding its competences under the Treaty and rejects the position the Commission has taken in this infringement procedure. The Commission has asked the Court of Justice to issue interim measures to suspend judicial activities of the Disciplinary Chamber with regard to judges, in particular concerning the lifting of judicial immunity, in order to avoid serious and irreparable harm to judicial independence and the EU legal order. On 14 July 2021, the Vice-President of the Court issued an Order for interim measures in case C-204/21 R, granting in full the Commission's request.

The European Court of Human Rights, seized in a number of cases related to the functioning of the Polish justice system, held that a 2015 appointment to the Constitutional Tribunal led to a breach of the requirement of 'a tribunal established by law'.

Comment:

The Report consistently depreciates the role and status of the Polish Constitutional Tribunal. Such action is another example of violating the principle of partnership between the Member States (and their bodies) and the EU institutions (Article 4 TEU).

It should be noted that in the ECtHR case-law, the doubts do not concern every judgment of the Constitutional Tribunal but only those panels of the Polish constitutional court which were composed of the judges appointed to the Constitutional Tribunal in 2015/16. An exceptional abuse is that the judgments of the Constitutional Tribunal issued in cases concerning the appointment of judges (P 22/19, U 2/20, Kpt 1/20, K 5/20, K 2/20, P 13/19) were listed only in footnote no. 33, and not in the main part of the document which contains the arguments concerning the correctness of these judgments.

In February 2021, the European Court of Human Rights communicated that there are currently 27 cases pending before it which raise various issues relating to the justice reforms of 2017 and 2018. So far, in 21 of the cases lodged, notice has been given to the Polish Government. On 7 May 2021, the European Court of Human Rights ruled that a bench including a judge appointed to a judicial post that had already been filled in by the legislature of 2011-2015 did not constitute a 'tribunal established by law'. These irregularities in the appointment procedure of judges to the Constitutional Tribunal have been raised as a serious concern in the Reasoned Proposal adopted by the Commission under Article 7(1) TEU procedure. The Constitutional Tribunal ruled that this judgement is 'non-existent'. On 29 June 2021, the European Court of Human Rights issued a ruling concerning the premature removal by the Minister of Justice of judges from their post as vice-presidents of ordinary courts. The Court emphasised the importance of safeguarding the independence of the judiciary and respect for procedural fairness in cases concerning the careers of judges, and held that, as their premature removal as vice-president of the court had not been reasoned nor examined either by an ordinary court or by another body exercising judicial duties, without there being any serious reason for the lack of judicial review, Poland had infringed the right of access to a court.

Concerns over the independence and legitimacy of the Constitutional Tribunal, raised by the Commission under the Article 7(1) TEU procedure, have still not been resolved.

This is also illustrated by the judgment of the European Court of Human Rights of 7 May 2021.

In 2020, the Ombudsperson continued to express concerns about the functioning and legitimacy of the Constitutional Tribunal, including as regards changes made to already designated hearing panels and dismissals of requests for recusal of judges in view of their alleged lack of impartiality or contested status. Also, the Council of Europe expressed similar concerns. Meanwhile, the Constitutional Tribunal continues to be seized on cases concerning the justice reforms not only by the Prime Minister, the Marshal of the Sejm, the National Council for the Judiciary and the newly created Disciplinary Chamber of the Supreme Court, but also by other (newly appointed) Supreme Court judges and the newly appointed First President of the Supreme Court. Three cases initiated at the Constitutional Tribunal by the Prosecutor General, the Prime Minister, and a group of members of the Sejm seek an assessment of the compatibility with the Constitution of EU Treaty provisions and a declaration of the precedence of the Polish Constitution over EU law. The Commission expressed its concerns about the motion lodged by the Prime Minister as it contests the fundamental principles of EU law, in particular the primacy of EU law. Despite clear case law of the Court of Justice, the Constitutional Tribunal already indicated in an *obiter dictum* that the Court of Justice lacks competence to issue rulings as regards the justice systems of the Member States. In spite of the concerns referred to above, the Constitutional Tribunal delivered decisions with a significant impact both on individuals and the institutional framework. In particular, on 22 October 2020 and on 15 April 2021 respectively, the Constitutional Tribunal issued decisions regarding the right to abortion and the situation of the Ombudsperson. These decisions sparked strong criticism within Poland and beyond. Moreover, on 14 July 2021 - following the issuance of an interim measures order by the Vice-President of the Court of Justice - the Constitutional Tribunal held that Article 4(3) second subparagraph TEU read in connection with Article 279 TFEU are unconstitutional to the extent that they oblige Poland to abide by interim measures orders issued by the Court of Justice that affect the organisation and functioning of Polish courts and the procedure before such courts. In a public statement, the Commission expressed its deep concern about this decision of the Constitutional Tribunal.

Comment:

It is doubtful, at least, from the point of view of the respect of the rule of law in a given Member State, to analyse the issues of sexual minorities' rights or permissible conditions for termination of pregnancy.

In the context of this fragment of the Report, it is only necessary to bear in mind that this matter does not concern the issue of the rule of law and should not be analysed in the Report as an internal matter of a Member State.

The National Council for the Judiciary continues to be composed mainly of politically appointed members.

Comment:

One cannot agree with the statement which was contained in the Report that: "the National Council for the Judiciary continues to be composed mainly of politically appointed members".

This sentence is not supported by any legal arguments. It was formulated without reference to the relevant provisions of the Polish Constitution and without comparing them with the regulations in force in other Member States with regard to the procedure for appointing judges. In fact, such a sentence depreciates the constitutional organ of a Member State and thus affects its sovereignty in flagrant violation of Art. 4 sec. 2 TEU.

It is recalled that the 2018 justice reform changed the procedure for the appointment of judges-members of the National Council for the Judiciary (NCJ).

Comment:

In this context, it can be pointed out that if the arguments presented in the Report regarding the appointment of members of the National Council of the Judiciary or judges in Poland were universally binding regarding the criteria for assessing independence, then both the appointment of judges of the CJEU and the ECtHR made in the political procedure could be contested.

Therefore, since the procedure for their appointment is in line with the principle of the rule of law at the level of the EU and the Council of Europe, the same should be applied to the procedure for appointing judges in those Member States that apply even stricter rules in this respect. It should also be noted that in Poland, the Ombudsman, President of the National Bank of Poland, and other constitutional bodies are also elected politically. Election by a democratic parliament provides democratic legitimacy that the National Council of the Judiciary does not have. Article 187 sec. 1 point 2 of the Constitution does not provide for a mandatory rule under which the fifteen members of the National Council of the Judiciary selected from among judges of the Supreme Court, common courts, administrative courts, and military courts are to be selected solely by judges. In Article 187 sec. 1 point 3 of the Constitution - regarding deputies and senators, the electing body was indicated (respectively: the Sejm and the Senate), but this does not mean that the persons referred to in Article 187 sec. 1 point 2 of the Constitution are to be elected by the judiciary. Such an interpretation would be contrary to the basic principle of linguistic interpretation. It prohibits the addition of expressions that do not appear in the normative text. No indication of the entity selecting the members elected from among judges of the Supreme Court, common courts, administrative courts and military courts in the wording of Article 187 sec. 1 point 2 of the Constitution means that, according to the Article 187 sec. 4 of the Constitution, the organizational structure, the scope of activity and procedures for work of the National Council of the Judiciary, as well as the manner of choosing its members, shall be specified by statute. According to the Constitution, the legislator has a specified margin of discretion in determining the model of the composition of the National Council of the Judiciary. Therefore, the legislator may modify the model of selecting judges to the National Council of the Judiciary maintaining the standards of independence of these judges.

In its judgment of 2 March 2021, upon a preliminary reference of the Supreme Court, the Court of Justice reiterated that for the participation of a Council for the Judiciary in making the appointment process of judges by political organs more objective, such body must itself be sufficiently independent of the legislature and executive and of the body to which it gives an opinion. On 6 May 2021, the Supreme Administrative Court ruled that the current NCJ does not provide sufficient guarantees of independence from the executive and the legislature in the procedure for appointing judges. Despite the serious concerns also expressed by a number of other Polish courts pointing to its lack of independence, the NCJ continues to propose candidates for judicial appointments to the President of the Republic which are systematically appointed. Throughout 2020 and 2021, the NCJ has issued one resolution to protect the independence of a Polish judge, namely, to express support to a member of the Disciplinary Chamber of the Supreme Court, while refusing to express similar support to judges targeted by criminal investigations carried out by the prosecution services in the same period. The NCJ also provided statements in support of certain aspects of the justice reforms criticised by the Commission.

Comment:

The statement in the Report that "throughout 2020 and 2021, the NCJ has issued one resolution to protect the independence of a Polish judge" is also untrue.

Even a cursory analysis of the resolutions of the National Council of the Judiciary from 2021 only shows that this body does not always share the position of the parliamentary majority and that it defends judges.

The Supreme Court, following changes in 2020, was subject to further reforms regarding its functioning. On 1 April 2021, the President of the Republic signed into law the bill of 30 March 2021 amending the law on the Supreme Court. The new law lowers the quorum requirements for judges to select candidates to the post of President of a Chamber and allows the President of the Republic to appoint an 'acting' President of the Chamber if such requirements are not met.

Comment:

The Report is full of imprecise statements, journalistic expressions and even inaccuracies. Fundamental doubts are raised by the editing of the document, which consists in including general information of a journalistic or popularizing nature, without any analysis of it, with simultaneous synthetic reporting of the position of the Polish State authorities in footnotes.

The Report contains an untrue statement that "the new law lowers the *quorum* requirements for judges to select candidates to the post of President of a Chamber and allows the President of the Republic to appoint an 'acting' President of the Chamber if such requirements are not met." In fact, the *quorum* needed to select a candidate for the President of the Chamber has not been changed. Only an additional solution was introduced in the event that the President of the Chamber was not elected on the first date. Such regulation is of a guarantee nature. It allows judges to select candidates for the President of the Chamber. This example should therefore be interpreted as compatible with the standard of independence of judges. The provision regulating the appointment of acting President of the Chamber was not intended to replace the President of the Chamber but to carry out the procedure of selecting candidates for this function (see: Article 15 § 2 of the Act on the Supreme Court).

Moreover, the law grants the First President of the Supreme Court control over sittings of joined Chambers gathered to settle legal issues, convened either by the First President on her own motion or at the request of i.a. the Prosecutor General or the Ombudsperson. The new law also changes the rules governing the extraordinary complaint procedure by prolonging by 2 years the period to make extraordinary complaint against all rulings of all Polish courts that became final after 17 October 1997.

Comment:

This fragment of the Report symbolically shows all the shortcomings of this document and the way of presenting individual issues. These claims were not supported by any legal arguments.

The the authors of the Report are not familiar with the content of Article 115 § 1 - 2 of the Act on the Supreme Court, which specifies the requirements for the applicability of an extraordinary complaint. Finally, the institution was intended to review judgments manifestly violating the law which became final after 17 October 1997. However, it should be clarified that this possibility was limited to 6 years from the date of entry into force of the Act on the Supreme Court (Article 115 § 1). Furthermore, extraordinary complaint proceedings may be initiated only by the so-called specific entities: the Public Prosecutor General or the Polish Ombudsman (Article 115 § 1a). Moreover, the legislator stipulated that if the contested judgment has caused irreversible legal effects, in particular it has been more than five years since the contested judgment became final, or if the rescission of such judgment would infringe international obligations of the Republic of Poland, the Supreme Court shall only pronounce the contested judgment to have been passed in infringement of the law (Article 115 § 2). Furthermore, the consistency of an extraordinary complaint with the standards of the ECtHR, especially legal certainty, was subject to the Supreme Court's supervision on several occasions, incl. in cases: I NsNc 22/20, I NsNc 57/20 and I NsNc 89/20. The conditions set out for an extraordinary complaint are applied strictly and the complaints are only dealt with when the functional condition is met. It indicates the need to revoke a final ruling to ensure compliance with the principle of a democratic state ruled by law. The report completely ignores the developed jurisprudence of the Supreme Court in this matter.

The Ombudsperson and the National Bar Council expressed critical views on the new law, underlining that it would further affect the independence of the Supreme Court. The current First President of the Supreme Court, appointed as reported last year following a contested procedure, has taken decisions giving rise to concerns, in particular seizing the Constitutional Tribunal on controversial issues, including to limit the right to access to documents and requesting to shield newly appointed Supreme Court judges - including herself - from having their status contested in cases pending before the Supreme Court.

Comment:

The reason for this action is not the restriction of access to "documents", but a signal to the legislator (after the control by the Constitutional Tribunal) that the provisions of this act are vague, which may violate the principle of specificity of legal provisions.

The purpose of the application of the First President of the Supreme Court to the Constitutional Tribunal was to ask about the conformity to the Constitution of certain provisions of the act of 6 September 2001 on access to public information. The position of the First President of the Supreme Court also applies to the criminal provisions of this act. The activity of this kind should be assessed as taking action for the benefit of the rule of law.

The application of the First President of the Supreme Court to the Constitutional Tribunal is aimed at a more complete implementation of the rule of law, aimed at eliminating the state of legal uncertainty also for individuals requesting an access to public information. The application of the First President of the Supreme Court is not intended to limit access to public information. Even if the Constitutional Tribunal agrees with the arguments contained in the application, the decision will still be left to the legislator, who will be able to extend the scope of access to public information by introducing clear legal solutions that do not pose any pitfallls for those applying this act.

The First President also seized the Chamber of Extraordinary Control and Public Affairs to recuse certain Supreme Court judges from cases in which they had already made a preliminary ruling request to the Court of Justice. On 16 July 2021, the First President of the Supreme Court issued a statement which refers to the judgment of the Constitutional Court of 14 July 2021 and, considering that EU law does not cover matters regarding the organisation and functioning of the Member States' judiciary, informs about the repeal of the instruction for the Disciplinary Chamber of the Supreme Court suspending its activity in disciplinary proceedings against judges.

Several judges are suspended and cannot adjudicate cases following the decisions of the Disciplinary Chamber to lift their immunity. The disciplinary regime, substantially amended in 2018, has given rise to concerns and the Commission contested its violation of EU law in infringement proceedings. On 8 April 2020, following a request for interim measures, the Court of Justice ordered Poland to immediately suspend the application of the national provisions on the powers of the Disciplinary Chamber of the Supreme Court with regard to disciplinary cases concerning judges. Following the suspension of the disciplinary cases from its remit, the Disciplinary Chamber has begun to actively exercise its new powers to decide on motions of the prosecution service to lift the immunity of judges alleged to have committed a criminal offence.

Comment:

Unfortunately, it should be assessed that the Report presents extremely unreliable information about the result of the examination by the Disciplinary Chamber of the Supreme Court of the so-called "Immunity cases" of Supreme Court judges.

It was pointed out that after the immunity of the President of the Labour Law and Social Security Chamber was lifted and he was suspended from official duties, "a group of 75 Supreme Court judges (retired and active) issued an open statement, condemning the decision and underlining that the Disciplinary Chamber is not a court within the meaning of national and EU law".
Without commenting on this statement, it should be explained that the waiver of the immunity of this judge was the result of a motion by the prosecutor's office of the Institute of National Remembrance on account of the suspicion of unlawful conviction, during the martial law period, of a 21-year-old man for distributing leaflets against the authorities of the Peoples Republic of Poland. In turn, other judges of the Supreme Court were accused of failure to fulfil their official duties, as a result of which two people were unlawfully deprived of liberty for a longer period than it was necessary in the pending proceedings. The above can only be commented on in the sense that those actions, undertaken in accordance with the principles provided for in the Act, comply with the principle of the rule of law

Since 14 February 2020, the date of entry into force of the new law on the judiciary, until 15 March 2021, the Disciplinary Chamber examined over 40 such motions already, and in more than 10 such cases the judges concerned have been suspended in office and their salary reduced. Several motions remain pending before the Disciplinary Chamber, including as regards judges of the Supreme Court. In the context of the infringement proceedings in case C-204/21, the Commission asked the Court of Justice to suspend all activities of the Disciplinary Chamber as regards cases concerning judges, including decisions to lift the immunity of judges. On 14 July 2021, the Vice- President of the Court of Justice granted, in full, the request of the Commission and suspended all activities of the Disciplinary Chamber of the Supreme Court as regards judges

- different from disciplinary cases concerning judges. On 15 July 2021, the Court of Justice issued a final ruling in the infringement case brought by the Commission, finding that the disciplinary regime for judges in Poland is not compatible with EU law.

Judges continue to be subject to intrusive requirements. The new law on the judiciary of 20 December 2019 obliges all judges in Poland to disclose personal information, such as their membership in associations, functions in non-profit organisations and their membership and position in political parties prior to 29 December 1989. Disciplinary proceedings against judges who refused to comply with this requirement continue to be pending. In the context of the infringement proceedings in case C-204/21, the Commission considers that this requirement is inconsistent with EU law as regards the right to respect for private life and the right to protection of personal data as guaranteed by the Charter of Fundamental Rights of the EU and the General Data Protection Regulation.

Comment:

These provisions do not in any way reduce the independence of the judiciary and the independence of judges. They concern information about the membership of judges, inter alia, in voluntary associations, non-profit organizations, etc.

The requirements referred to in the Report in relation to the 20 December 2019 amending Act) only increase the independence of courts and provide greater transparency of the conduct of judges and judicial proceedings. These provisions in no way limit the independence of the judiciary and the impartiality of judges.

A general prohibition for Polish courts to challenge the powers of courts and tribunals, constitutional organs and law enforcement agencies continues to exert its effects. The new law on the judiciary prevents Polish judges from ruling on the lawfulness of judicial appointments and on a judge's power to perform judicial functions. The same prohibition applies to judges assessing the lawfulness of the composition of a hearing bench. At the same time, the law granted the new Chamber of Extraordinary Control and Public Affairs the sole power to decide on issues related to judicial independence. The Commission decided on 31 March 2021 to challenge these prohibitions of the law on the judiciary in infringement proceedings before the Court of Justice. On 14 July 2021, the Vice-President of the Court of Justice issued an Order for interim measures in case C-204/21 R, suspending the application of the provisions concerned. In certain cases, in which ordinary courts challenged the legality of rulings delivered by the Constitutional Tribunal and by the Disciplinary Chamber, judges have been subjected to disciplinary proceedings.

Concerns persist regarding the fact that the offices of Minister of Justice and the Prosecutor General are held by the same person. As already set out in the 2020 Rule of Law Report, following the merging in the context of the reforms in 2016 of the positions of Prosecutor General and Minister of Justice, the Minister of Justice directly wields the powers vested in the highest prosecutorial office, including the authority to issue instructions to prosecutors in specific cases and to transfer prosecutors. This power has been subject to criticism including by the Venice Commission and by the Commission in its Reasoned Proposal adopted under the Article 7(1) TEU procedure relating to the rule of law in Poland. Recently, the National Prosecutor has actively exercised the power to transfer prosecutors, without their consent and without providing justification, to another post for up to 6 months. This power is reported to be used in practice as a tool against prosecutors who express critical views about the

functioning of the prosecution service. Judges seized in disputes in which such secondments are challenged have been called by the prosecution services to testify in the context of criminal investigations. Moreover, concerns are raised that the exercise by the Prosecutor General and the National Prosecutor of their power to discretionally reattribute cases among prosecutors may be influenced by political considerations in order to impact on the conduct of criminal proceedings, including in cases of allegations of financial embezzlement. According to the National Bar Council, the prosecution services have recently also been targeting defence lawyers acting in politically sensitive cases, thereby posing a threat to the right to professional secrecy. This is aggravated by the fact that prosecutors have the power to suspend a lawyer's licence without prior consent of the court.

Quality

As regards human resources, similarly to 2020, a significant number of judicial posts remain vacant. According to the official data published by the Ministry of Justice, in 2020 there were 1048 vacant posts in ordinary courts. This being said, Poland's expenses on courts are at the level of the EU average per inhabitant and Poland continues to have one of the highest general government expenditures for the justice system (including prosecution and legal aid) as a percentage of GDP.

Comment:

The Polish judiciary is at least as efficient as the courts in most Member States, and it should be an important measure of the state of the rule of law. The judiciary in Poland also functioned successfully during the pandemic.

The Report also contains contradictory claims. For example, at the beginning of the document it mentions the shortcomings of the Polish justice system - including the progressive depreciation of social trust. What is further said is that in terms of effectiveness, the Polish justice system is close to the EU average. In terms of administrative judiciary, it is even higher than the EU average.

Important progress has been made but there is room for improvement in the digitalisation of the justice system. There is still a need to introduce more IT tools in the context of judicial procedures, and stakeholders have called for further efforts to digitalise courts. There is also a need to revise those IT tools which the Supreme Audit Office found to be prone to abuse, in particular the system of allocation of cases in courts. This year, the Sejm adopted amendments to the Code of Civil Procedure aimed at a further digitalisation of the civil procedure. The reform will introduce electronic auctions concerning properties to be used by bailiffs in the context of execution of court rulings. Moreover, notwithstanding critical views expressed by representatives of legal professions, the reforms seek to introduce a system of electronic submission of documents through a comprehensive IT system for ordinary courts, where a document would be presumed to have been duly delivered 14 days following its submission.

Further reforms concerning criminal and civil procedural law have been adopted. In order to respond to challenges created by the COVID-19 pandemic, recently adopted provisions introduce an obligation to hold court sittings in camera in case online connection with parties to civil proceedings is not possible. Accordingly, during the state of epidemics, civil cases would be mostly examined by single-judge benches only and the modalities applicable to specific procedures would be suspended. Furthermore, these changes would also prohibit courts and tribunals in Poland from convening general assemblies. Also as regards the criminal procedural law, the Sejm adopted a set of amendments. The changes would, among others, limit

access to the casefiles of closed preliminary investigations, and would introduce obligations on telecom operators to secure data immediately following a request of a court or a prosecutor without any provision limiting this power. Specific changes to modalities applicable to the composition of hearing benches would also be introduced. Some of these changes have given rise to criticism.

Efficiency

The overall performance of ordinary courts is close to the EU average when it comes to the length of proceedings.

In 2019, there was a slight decrease in the estimated time needed to resolve litigious civil and commercial cases, and the rate of resolving such cases improved. Whereas the number of such cases in 2019 dropped, the number of pending cases remained the same. As regards the overall performance of ordinary courts, according to data published by the Ministry of Justice in 2021, between 2015 and 2020 the average length of proceedings increased from 4.2 months to 7 months. Poland remains under enhanced supervision of the Committee of Ministers of the Council of Europe for the length of civil and criminal proceedings.

The performance of administrative courts is above the EU average. A slight increase is visible in the number of incoming administrative cases, whilst the estimated time needed to resolve them continues to decrease. The rate of resolving such cases dropped below 100%.

[…]

Annex I: List of sources in alphabetical order*

Comment:

The list of sources mentioned in the Report consists mainly of media materials, including those posted on the Internet (e.g., from Polish websites: Gazeta Wyborcza, doRzeczy.pl, press.pl, praw.pl, Dziennik Gazeta Prawna) or press releases.

From the point of view of the methodology of preparing professional analytical studies, must raise serious doubts and objections as to the adopted methodological standard, since it depreciates the substantive level of the document so prepared.

** The list of contributions received in the context of the consultation for the 2021 Rule of Law report can be found at https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2021-rule-law-report-targeted-stakeholder-consultation*

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