Parliamentary Assembly
Assemblée parlementaire
https://pace.coe.int

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Resolution 2359 (2021)[1]

Judges in Poland and in the Republic of Moldova must remain independent

Parliamentary Assembly

1. The Parliamentary Assembly refers to its previous resolutions on upholding the rule of law and the situation with regard to the judiciary in the member States of the Council of Europe, in particular Resolution 1685 (2009) on allegations of politically motivated abuses of the criminal justice system in Council of Europe member States, Resolution 2098 (2016) and Recommendation 2087 (2016) "Judicial corruption: urgent need to implement the Assembly's proposals", and Resolution 2188 (2017) "New threats to the rule of law in Council of Europe member States: selected examples".

2. The Assembly reiterates that respect for the rule of law is one of the core values of the Council of Europe, that it is closely interlinked with democracy and respect for human rights and can only be achieved in a conducive environment. Corruption and conflicts of interest are always detrimental to its full realisation.

3. With regard to the Republic of Moldova, the Assembly is concerned about the proximity of part of the judiciary to the political power which raises questions about the effectiveness of efforts to combat abuse of power and corruption.

4. As regards Poland, the Assembly notes that many judges have been subjected to various forms of harassment in recent months. In particular, disciplinary or pre-disciplinary proceedings have been brought against judges who have spoken in public about the independence of the judiciary, criticised ongoing reforms, taken part in activities to raise public awareness of issues concerning the rule of law and/or submitted preliminary questions to the Court of Justice of the European Union (CJEU) or to the Polish Supreme Court. Some judges have been threatened or effectively demoted. The Assembly condemns the campaign of intimidation waged by the political power against certain critical judges and against the judiciary in general, as well as the lack of protective measures for judges who are the subjects of that campaign. Such conduct is unworthy of a democracy and a law-governed State.

5. Access to justice before independent and impartial courts is one of the main indicators for assessing respect for the rule of law in a given country, as pointed out in the "Rule of Law Checklist" produced by the European Commission for Democracy through Law (Venice Commission), and which was endorsed by the Assembly in Resolution 2187 (2017). This essential right is guaranteed by Article 6.1 of the European Convention on Human Rights (ETS No. 5, "the Convention"). In its case law, the European Court of Human Rights ("the Court") has repeatedly emphasised that for a judicial body to be considered as independent – notably with regard to the executive and the parties to the case – it is necessary to examine the manner of appointment of its members, the duration of their term of office, the existence of guarantees against outside pressures and the question of whether the body presents an appearance of independence.

6. The Assembly also refers to Recommendation CM/Rec(2010)12 of the Committee of Ministers to member States on judges: independence, efficiency and responsibilities, which states that the independence of judges is an "inherent element of the rule of law, and indispensable to judges' impartiality and to the functioning of the judicial system" and that it is "a guarantee of respect for human rights and fundamental freedoms, allowing every person to have confidence in the justice system". Where judges consider that their

1. *Assembly debate* on 26 January 2021 (3rd Sitting) (see Doc. 15204, report of the Committee on Legal Affairs and Human Rights, rapporteur: Mr Andrea Orlando). *Text adopted by the Assembly* on 26 January 2021 (3rd Sitting).

independence is threatened, they should be able to have recourse to a council for the judiciary or another independent authority, or they should have effective means of remedy. Councils for the judiciary seek to safeguard the independence of the judiciary and of individual judges; not less than half the members of such councils should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary.

7. The Assembly points out that these principles have been reaffirmed in the documents of specialised Council of Europe bodies such as the Venice Commission, the Group of States against Corruption (GRECO), the European Commission for the Efficiency of Justice (CEPEJ) and the Consultative Council of European Judges (CCJE).

8. The Assembly notes that its Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee) also examines the issue of the independence of judges in Council of Europe member States in the course of its work and refers to its most recent resolutions – Resolution 2308 (2019) on the functioning of democratic institutions in the Republic of Moldova and Resolution 2316 (2020) on the functioning of democratic institutions in Poland.

9. Having regard to the findings of Resolution 2308 (2019) concerning the Republic of Moldova, which is the subject of an Assembly monitoring procedure, the Assembly is concerned that several attempts to reform the judiciary have not been successful and that corruption, including within the circles of the judiciary, remains a widespread phenomenon in this country. It takes note of the latest political changes and the political will on the part of the government to prioritise justice reform and welcomes the high-level consultations between the authorities and representatives of the Council of Europe.

10. The Assembly accordingly calls on the authorities of the Republic of Moldova to:

10.1. continue the reform of the judiciary, the Superior Council of Magistracy and the prosecution service in line with the recommendations of Council of Europe organs and bodies and in particular to finalise the adoption of the amendments to Article 122 of the constitution;

10.2. take the necessary steps to implement the new strategy for reform of the judiciary, taking into account the analysis by Council of Europe experts; to this end, the Moldovan authorities should prioritise the issue of the evaluation of judges and prosecutors and make full use of the procedures already available for ensuring the integrity of the judiciary;

10.3. significantly step up their efforts to combat corruption among judges and prosecutors and, to this end, implement the GRECO recommendations;

10.4. continue co-operating with the Venice Commission and with the other Council of Europe bodies and organs.

11. With regard to Poland, the Assembly notes that, in view of the concerns which it expressed in Resolution 2316 (2020) concerning the changes in the functioning of the justice system introduced since late 2015, it has opened a monitoring procedure in respect of this country. Poland is the only European Union member State currently undergoing this procedure. The Assembly remains concerned about the events that followed the adoption of the said resolution, notably the entry into force of the law of 20 December 2019, new disciplinary proceedings against judges and proceedings with a view to lifting their immunity, even for actions taken in the performance of their judicial duties, and further cases of judges being harassed.

12. The Assembly notes that the concerns expressed in Resolution 2316 (2020) remain valid:

12.1. the “constitutional crisis” has not been resolved and the Constitutional Tribunal seems to be firmly under the control of the ruling authorities, preventing it from being an impartial and independent arbiter of constitutionality and the rule of law;

12.2. given the current composition of the National Council of the Judiciary (NCJ) and the judgment handed down by the CJEU on 19 November 2019, the NCJ can no longer be regarded as an autonomous body independent of the legislature and the executive;

12.3. the Disciplinary Chamber of the Supreme Court does not meet the requirements of independence and impartiality set out in the CJEU judgment of 19 November 2019, as the objective circumstances in which that court was formed, its characteristics and the means by which its members have been appointed are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of that court to external factors; the same reasoning may be applied to the Supreme Court’s Chamber of Extraordinary Control and Public Affairs;

12.4. the powers of the minister of justice with respect to the appointment and dismissal of court presidents, disciplinary proceedings against judges and the internal organisation of courts remain excessive, particularly in view of his powers as prosecutor general.

13. The Assembly also remains concerned about the reaction of the Polish authorities to the Supreme Court resolution of 23 January 2020 and calls on the Polish authorities to fully abide by this resolution. It is concerned about the legal chaos which the "reform" of the judiciary has meant for litigants in Poland and abroad affected by the decisions of the Polish courts, whose validity has been called into question by the serious doubts over the legitimacy of the procedure for appointing certain judges, including judges of the Constitutional Tribunal and the Supreme Court, as well as the appointment of the latter's first president. It considers that the entry into force of the law of 20 December 2019 will deter judges from exercising their rights to respect for private life and freedom of expression and association, as enshrined in Articles 8, 10 and 11 of the Convention respectively, and may prevent them from raising doubts as to whether the composition of a court might render proceedings void on grounds of nullity.

14. Accordingly, the Assembly calls on the Polish authorities to:

14.1. refrain from applying the provisions of the law of 20 December 2019;

14.2. review the changes made to the functioning of the Constitutional Tribunal and the ordinary justice system in the light of Council of Europe standards relating to the rule of law, democracy and human rights; following the findings of the Venice Commission included in its Opinion No. 977/2020 of 22 June 2020 concerning in particular the amendments to the Law on the Common Courts introduced since 2017, it would be advisable to:

14.2.1. revert to the previous system of electing judicial members of the National Council of the Judiciary or adopt a reform of the justice system which would effectively ensure its autonomy from the political power;

14.2.2. review the composition, internal structure and powers of the Disciplinary Chamber and the Extraordinary Control and Public Affairs Chamber of the Supreme Court;

14.2.3. review the procedure for the election of the First President of the Supreme Court;

14.2.4. reinstate the powers of the assemblies of judges with respect to the appointment, promotion and dismissal of judges;

14.3. refrain from taking any legislative or administrative measures or other initiatives which might pose a risk to the rule of law and, in particular, to the independence of the judiciary;

14.4. co-operate fully with Council of Europe organs and bodies, including the Venice Commission, and with the institutions of the European Union, on issues related to justice reform;

14.5. institute a constructive and sustainable dialogue on justice reform with all stakeholders, including opposition parties, representatives of the judiciary, bar associations, civil society and academic experts.

15. The Assembly highlights and recalls the judgments handed down by the CJEU in the cases concerning the early retirement of Supreme Court judges (C-619/18) and ordinary court judges (C-192/18) and the legitimacy of the Disciplinary Chamber of the Supreme Court (C-585/18, C-624/18 and C-625/18), which have made it possible to remedy certain violations of the principles of judicial independence. In particular, it notes with satisfaction that, following the CJEU's judgment of 24 June 2019 (case C-619/18), the judges of the Supreme Court were reinstated in their posts, and calls on the authorities to comply fully and as soon as possible with the other two judgments handed down by the CJEU and with its order of 8 April 2020 (case C-791/19) on provisional measures mainly concerning the suspension of the application of the relevant provisions on the Disciplinary Chamber of the Supreme Court.

16. The Assembly refers to its Resolution 2178 (2017) on the implementation of judgments of the European Court of Human Rights and calls on Poland and the Republic of Moldova to fully implement these judgments and to give political priority to those judgments which reveal a pressing need for wide-ranging reform of the judicial system. As regards Poland, this is valid despite the progress it has realised in the implementation of the Court's judgments concerning the excessive length of judicial proceedings.

17. Fully aware of the diversity of legal systems and cultures in Council of Europe member States, the Assembly calls on the Moldovan and Polish authorities to promote a political and legal culture conducive to the implementation of the rule of law and in particular to the independence of the judiciary, in law and in practice.