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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Doc. 15025 Add.
27 January 2020

The functioning of democratic institutions in Poland

Addendum to the report
Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee)
Co-rapporteurs: Ms Azadeh ROJHAN GUSTAFSSON, Sweden, Socialists, Democrats and Greens Group, and Mr Pieter OMTZIGT, Netherlands, Group of the European People's Party

1. Introduction

1. As we outlined in our report, on 19 November 2019, the Court of Justice of the European Union (CJEU) delivered its judgment in joint cases (C-585/18, C-624/18 and C-625/18) regarding the independence of the Disciplinary Chamber of the Supreme Court. As mentioned, in this judgment the CJEU considered that, with regard to the Special Disciplinary Chamber of the Supreme Court, there are legitimate doubts regarding "the imperviousness of that court to external factors, in particular, as to the direct or indirect influence of the legislature and the executive and its neutrality with respect to the interests before it".[1] The CJEU therefore ruled that national courts have the obligation to disapply provisions in the domestic legislation that give exclusive jurisdiction to the Special Disciplinary Chamber. The CJEU left it to the Supreme Court to decide on the independence of both the Disciplinary Chamber of the Constitutional Court and the independence of the National Council of the Judiciary (NJC) on the basis of the guidelines provided by the CJEU. In addition, it ruled that national courts have the duty to disregard provisions in national law if, in cases where EU law may be applied, these provisions give jurisdiction to a body that does not meet the requirements of independence and impartiality as set out by the CJEU[2].

2. Subsequently, on 5 December 2019, the Labour Chamber of the Supreme Court ruled that the National Council of the Judiciary, which is, inter alia, responsible for the nomination of judges, is not an impartial and independent body and that the Disciplinary Chamber does not fulfil the requirements of independence and impartiality, as set out in the CJEU ruling. It therefore cannot be considered a legal Court under EU law and domestic Polish law.

3. To our regret, this judgment by the Supreme Court was rejected by the authorities. The Disciplinary Chamber has continued its activities, despite the fact that the first President of the Supreme Court of Poland has called upon the judges of the Disciplinary Chamber to stop adjudicating cases, in line with the judgment of the Labour Chamber. The continuation by the Disciplinary Chamber of its work, despite the judgment of the Supreme Court, is of serious concern and is at odds with the principles of the rule of law. Moreover, as also stated by the European Commission, the continued operation of the disciplinary chamber has a chilling effect on the Polish judiciary[3]. In response to this, on 14 January 2020, the European Commission requested the CJEU to order, as an interim measure, the Polish government to suspend the functioning of the Disciplinary Chamber.[4]

1. See Doc. 15025 § 107.
2. CDL-PI(2020)002 §13-15.
3. Reuters, 14 January 2020.
4. Ibid.

4. On 12 December 2019, a private member's bill was introduced by MPs from the ruling party proposing a series of amendments to the Law on the Common Courts, the Law on the Supreme Court and some other laws. These amendments proposed a number of far-reaching and controversial changes to the polish legal system. In particular, the amendments would[5]:

4.1. prohibit any political activity of judges and oblige them to publicly disclose any membership of associations;

4.2. prohibit the questioning, by another domestic court or judge, of the legitimacy of any judge appointed by the President of the Republic and provide for severe disciplinary punishment in cases of transgression of this interdiction;

4.3. introduce a series of new disciplinary offences for judges and court presidents;

4.4. transfer competencies from the assemblies of judges to newly established colleges composed of court presidents appointed by the Minister of Justice;

4.5. change the process of electing the first President of the Supreme Court by substantially lowering the quorum in the third round of voting.

5. It is clear that these amendments were introduced in reaction to the judgement of the CJEU of 19 November 2019 and the subsequent ruling of the Supreme Court with regard to the National Council of the Judiciary. An additional and related reason is the fact that, when considering cases before them, several domestic courts had raised questions about the legitimacy of judges appointed after the controversial reform of the National Council of the Judiciary. The combined effect – and clear objective – of these amendments was to punish judges critical of the reforms introduced by the authorities and to nullify the effect of the CJEU ruling of 19 November 2019. The nature of the amendments was underscored by the manner in which they were introduced and adopted in the Sejm. As a private member's bill, consultation procedures normally provided for government bills could be bypassed and reportedly no consultation with stakeholders, external experts or civil society has taken place in the preparation and consideration of these amendments. They were introduced under an accelerated procedure, giving the Sejm very little time to discuss these amendments before adopting them in the first reading on 18 December and second reading on 20 December 2019. We deeply regret this and take the view that this amounts to an abuse of the accelerated procedure for such far-reaching and controversial issues. These amendments were decried by the opposition and a large part of the judicial community, which labelled the bills "muzzling laws," and argued that they served as a punishment.

6. However, the Polish Senate, in which the ruling party no longer enjoyed a majority since the last election, refused to consider the bill under the accelerated procedure and insisted on a meaningful debate on the proposed amendments. According to constitutional provisions, the Senate has 30 days to consider the draft law, after which it either approves the law, sends it back to the Sejm with amendments or rejects it in its entirety. In order to aid the Senate in its deliberations, the Marshal of the Polish Senate requested an urgent opinion from the Venice Commission on these amendments. The joint opinion of the Venice Commission and the Directorate General of Human Rights and the Rule of Law (DG1) of the Council of Europe was issued on 16 January 2020[6]. On the basis of this opinion, the Polish Senate rejected the bill in its entirety on 17 January 2020. However, this decision can be overruled by the Sejm with an absolute majority.

7. In its opinion[7], the Venice Commission strongly criticised the draft amendments, which it felt "further undermine the independence of the judiciary".

8. With regard to the total prohibition of political activity by judges, the Venice Commission noted that judges indeed have the duty of "restraint and discretion" in those cases where "the authority and impartiality of the judiciary are likely to be called in question". At the same time, the Venice Commission, with reference to the case-law of the European Court of Human Rights[8], emphasised that this cannot be taken to imply that judges and judicial bodies are totally banned from voicing opinions or criticising judicial reforms that affect them. The current amendments, which aim to do exactly that, therefore run counter to the requirements of Article 10 (freedom of expression) of the European Convention on Human Rights. While a prohibition on active membership and the holding of leadership positions in political parties by judges can also be found in other member States, and while declarations of assets and possible conflicts of interest are common, the

5. CDL-PI(2020)002 §19.
6. CDL-PI(2020)002.
7. Please refer to the opinion for a detailed analysis of the proposed amendments.
8. Baka vs Hungary, application no. 2061/12; Previti vs Italy, application no. 45291/06 (only available in French).

obligation to declare membership of associations, including professional associations, is problematic, especially in the context of the excessive powers and control over the judiciary by the Minister of Justice[9] who, as noted by the Venice Committee in its opinion, could use this information for ulterior purposes[10].

9. As noted in the opinion the Venice Commission, these amendments in effect eliminate the possibility for Polish courts to examine whether a court decision before them was issued by a legitimate court or judge appointed in line with constitutional provisions and in compliance with European standards and norms. According to the amendments, only the Extraordinary Appeals Chamber would have the power to rule on the independence of judges and courts. However, as we outlined in our report, it is exactly the independence and impartiality of these two new special chambers of the Supreme Court (the Disciplinary Chamber and Extraordinary Appeals Chamber) that are at the heart of the CJEU ruling.

10. These amendments therefore raise questions with regard to their compliance with the ECHR, particularly Article 6 (right to a fair trial). In addition, a clear objective of these amendments is to nullify the judgment of the CJEU of 19 November and subsequent Supreme Court Ruling. This is a clear challenge to the Supremacy of EU law and the status of the CJEU, in contradiction to Poland's obligations under EU law and treaties.

11. We recognise that, as a result of the recent reforms, a situation has arisen whereby the legality, as well as the independence and impartiality, of judges and courts can be questioned by other domestic courts. We agree with the Polish authorities that this is a very serious and untenable situation. However, the Polish authorities should remedy this situation by addressing the underlying causes, namely the serious shortcomings and deficiencies introduced by the recent reforms, rather than trying to outlaw the justified questioning of the effects of these reforms by courts and judges. This is the political equivalent of "shooting the messenger," and does not address the serious challenges to the independence and impartiality of the polish judiciary and justice system.

12. As mentioned, public criticism, even if extrajudicial, by judges of the reforms to the judiciary and the questioning of its effects on the impartiality and independence of judges and judicial bodies can result in disciplinary proceedings, potentially leading to the dismissal of the judge. As already stated, this raises questions with regard to freedom of speech, as guaranteed under Article 10 of the ECHR. In addition, a number of other offences that can lead to disciplinary action are introduced by the amendments. In its opinion, the Venice Commission notes that the definition of these offences is "overbroad" and "open-ended", threatening the principle of legality and making them vulnerable to abuse. This is especially worrying, given the excessive concentration of power over the judiciary that is vested in the Minister of Justice, and which we already highlighted as a main concern in our report. In that context, we are alarmed to see that the amendments further increase the powers of the Minister of Justice over the judiciary. Court presidents are obliged to submit annual reports to the Minister of Justice. If these reports are refused by the Minister, which is fully within his discretion, and the National Council of the Judiciary does not accept an appeal of the court president in question against this decision, this may lead to disciplinary sanctions – including dismissal – against the court president. In light of the questions regarding independence of the National Council of the Judiciary, these amendments therefore give nearly unrestricted control over the court presidents to the Minister of Justice[11].

13. As noted by the Venice Commission, the amendments lower the involvement of judges' assemblies in judicial self-government bodies, but at the same time increase the already excessive powers of the Minister of Justice in disciplinary proceedings, which is of concern. With regard to the election of the first President of the Supreme Court, the amendments lower the quorum required for the election of the first President in the third round of voting and allow for the appointment, by the President of Poland, of an ad interim first President. Combined with the previous amendments that increased the number of candidates to be presented to the President of Poland to make his choice, these amendments could lead to the appointment by the President of Poland of a first President of the Supreme Court that is not supported by the majority of court's judges, or even only supported by a small number of Supreme Court judges. As a result, the appointment process of the first President of the Court has become vulnerable to attempts to install political appointees at the helm of the Supreme Court.

14. In conclusion, these amendments further deteriorate the independence of the judiciary and respect for the rule of law in Poland and deepen our concerns about the reforms implemented. The proposed amendments do not address any of the shortcomings and deficiencies in the justice system in Poland,

9. See Doc 15025.
10. CDL-PI(2020)002 § 29.
11. CDL-PI(2020)002 § 44-45.

including the fact that, as a result of recent reforms, there are now grounds for domestic and international judicial bodies to question the legitimacy of the jurisdiction of courts and appointment of judges. The sole purpose of these amendments seems to be to stifle any criticism within the judiciary with regard to the reforms of the justice system and to nullify the judgments of the CJEU with regard to the independence of the judiciary. This is not acceptable in a democracy based on the principle of the rule of law and runs counter to Poland's obligations under international law, including towards the Council of Europe. We therefore urge the Sejm not to overrule the Senate's rejection of these amendments and call upon the authorities to ensure that this bill is withdrawn from consideration.

2. 2. Proposed amendment

15. As a result of these recent developments, we would like to propose the following amendment to the draft resolution on the functioning of democratic institutions in Poland contained in Doc. 15025:

Amendment A

After paragraph 8, insert the following paragraph:

"The Assembly expresses its deep concern about the draft amendments to the Law on the Common Courts, the Law on the Supreme Court and some other laws of the Republic of Poland, as adopted by the Sejm on 23 January 2020, despite their rejection by the Polish Senate on 17 January 2020 and the very critical assessment by the Venice Commission of these amendments. It regrets that these amendments were considered under an accelerated procedure without any consultation with the main stakeholders or civil society. The Assembly welcomes and supports the urgent opinion of the Venice Commission on these amendments. The Assembly considers that adoption of these amendments further deteriorates the independence of the judiciary and respect for the rule of law in Poland and runs counter to the country's obligations under international law, including its obligations deriving from membership to the Council of Europe. In addition, they are at odds with Articles 6 and 10 of the ECHR. The Assembly therefore urges President Duda not to sign these amendments into Law and calls upon the authorities to fully respect the judgment of the Polish Supreme Court of 23 January 2020, as well as of international tribunals they are party to, including those of the CJEU. The Assembly further calls upon the Polish authorities to promptly address the shortcomings and deficiencies of the justice system highlighted in, inter alia, this resolution".