Hanna Machińska
University of Warsaw
ORCID: 0000-0003-1306-4305

THE SYSTEM OF JUSTICE: EUROPEAN SAFEGUARDS

The state of democracy, human rights and the rule of law has rightly been perceived as an imperative of European security. In the third Report of the Secretary General of the Council of Europe on this very subject, certain worrying tendencies have been indicated which may endanger the security of our entire continent[1]. The migration crisis which generates a social, economic and political instability, the lack of agreed policy of the European states in this respect, terrorist attacks, racism, xenophobia, islamophobia, anti-Semitism, hate speech, territorial conflicts all create a climate for the acceptance of populism which knows no borders. These challenges should be met with a response in the form of a strong law based on international standards and a functioning separation of powers. However, what is observed in many countries is, as the Secretary General has mentioned, a specific legislative nationalism which rejects the well-established and applied system of standards and questions the competencies of the European system of justice, and which eliminates international treaties from the national legal space. These phenomena distort the established international legal order and are extremely dangerous signals to these states where democratic traditions have not yet been well grounded, and whose strength should, after all, lie in a system of justice which is fully independent from the legislative and executive powers.

1. EUROPEAN SAFEGUARDS OF THE SYSTEM OF JUSTICE

We shall try to find an answer to the question of whether there are European safeguards in the system of justice and whether they can serve as a dam halting the actions of state institutions who violate the fundamental standards of the rule of law. When performing such an assessment, we have to show the process

[1] State of democracy, human rights, and the rule of law. Populism, how strong are Europe's checks and balances?, Report of the Secretary General of the Council of Europe 2017.

of building the European toolkit for counteracting the destruction of democracy and the rule of law and human rights in the period of the last 30 years of the difficult process of European integration of the Central and Eastern European states. This historical context serves to present the processes of creation of European institutions and the construction of their instruments, which were to influence the transformations of states admitted to the first European organisation – the Council of Europe – which had at the time been shaping its identity for already forty years. This was all the first laboratory of ideas and principles on which the new system of law was built, and on which the rules of the functioning of institutions following the tri-division of power were based. The process of accepting new members to the Council of Europe was connected with differently specified acceptance conditions regarding the system of justice, the adoption of legal standards, and the functioning of a democratic state. The process of reaching more unity by the states, which was the statutory objective of the Council of Europe, as well as fulfilling the conditions for membership which stipulated the observance of the rule of law and human rights, was accompanied by a system of monitoring including all institutions of the Council of Europe and its most important treaties. The institutional and legal system was made, first and foremost, for the new member states and, in consequence, for all the countries and institutions, with the aim of facilitating the overcoming of the historical lines of division in Europe.

Have the member states of the Council of Europe reached the initially assumed level of harmonisation of legal systems, independence of the judiciary, and the rule of law after the almost 30 years of their membership? The question finds partial answer in the above-mentioned Report of the Secretary General, as well as in the previous one from 2016[2]. The reports address a broader field which stretches beyond the judiciary and also encompasses the freedoms of speech, assembly and association, as well as the functioning of democratic institutions and inclusive societies.

What guarantees the respect for the rule of law are systems of law which ensure the common access to the system of justice. The assessment of the functioning of the system of justice takes place on the basis of the following parameters: the independence of the judiciary, the effectiveness of procedures, the execution of court judgements, the legality and certainty of law, access to legal aid, the functioning of legal associations.

The assessment of the independence of the judiciary is related to judges and courts. In the case of 21 countries, this assessment reveals an unsatisfactory level of standards regarding the separation of powers, the undermining of the significance of the system of justice and using it for political purposes, the lack of transparency in the process of nominating judges, dysfunctional judicial councils and

[2] State of Democracy, Human Rights and the Rule of Law. A security imperative for Europe, Report by the Secretary General of the Council of Europe 2016.

the domination of the executive power. In 27 states it has been observed that the effectiveness of the court procedures is unsatisfactory, and court proceedings are excessively long. Legality understood as a process of appropriate production of law, its application, implementation, as well as presence of legal certainty is often infringed by means, for example, of adopting law by a parliamentary majority without the necessary consultations and in violation of all possible principles of correct legislation.

The functioning of legal aid is also unsatisfactory, which is often a result of limited finances.

The report which, as I have stressed, also encompasses many other problems gives examples of countries where the principles of the rule of law are being broken.

The fundamental issue which is mentioned in the report is the way to strengthen the European democracy against populist attacks. Is the system of justice of the European states sufficiently resistant to political pressure? Are the constitutions and parliaments of countries guaranteeing a proper balance of powers? Is there a freedom of speech and assembly? Finally, are the media in the European states independent?

Populism is a huge threat to democracy because, as it is stressed in the report, it jeopardises pluralism, leads to dismantling of democratic institutions, violates the principles of the separation of powers, presents a risk to the freedom of the media and the existence of the civil society and undermines human and minority rights. Both reports give examples of countries in which the principles of the rule of law, democracy and human rights are very clearly violated. Among these are Russia, Poland, Hungary, Azerbaijan, etc.

The preservation of the rule of law has ever since 1949 been the undisputable principle of strengthening the statehood. It has been reflected in the jurisprudence of the European Court of Human Rights as well as in Article 3 of the Statue of the Council of Europe, which stipulates that "Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter 1". It should be underlined that the jurisprudence of the ECHR has in many of its judgments referred to the principle of the rule of law, recognizing that this principle derives from all of the provisions of the Convention.

This principle is specified in many of the documents of the Committee of Ministers and the Parliamentary Assembly of the Council of Europe as a foundation of the democratic state which is characterised by a specific dynamism. It is also underlined that the rule of law is understood as: respect for the separation of powers, duty for the executive power to respect law, observance of the rule of compliance with the law, respect for legal certainty and the principle of *res iudicata,* maintenance of judicial control of the executive power, exercise of the right to court, guarantee of a fair trial, existence of an effective appeals remedy.

Member states of the Council of Europe were also, in the initial period of their accession, fully understanding of the rule of law seeing that common values and common principles consolidate states and are an effective safeguard of the respect for human rights, democracy, and the rule of law.

In 2010, the Committee of Ministers of the Council of Europe started a debate on the rule of law recognising that the absolute basis for respecting this principle is the independence of the judiciary.

In 2011, the Venice Commission adopted a report on the question of the rule of law[3]. The Commission has underlined the fact that although there are different definitions of the principle, it should be rather accepted that the common area filling the notion of "the rule of law" consists of: supremacy and certainty of law, prohibition of arbitrariness, access to an independent court, respect for human rights, non-discrimination, and equality before the law.

In 2016, the Venice Commission prepared a broadened list of the assessments of the above-mentioned principles, according to which it was possible to determine the state of the rule of law in different countries[4]. The list is a certain guide for parliaments, governments, non-governmental organisations and the civil society. It also takes into account the position of the European Union or the UN General Assembly[5]. Of course, the jurisprudence of the ECHR cannot be omitted here, as the Court has indicated the principle of the rule of law in many of its judgments. On the basis of the list compiled by the Venice Commission it is possible to assess the legal safeguards present in a state and to determine the improper practices or the badly established laws. It is underlined, at the same time, that the rule of law in its application cannot be limited only to the sphere of law, as the assessment should also include the important element of the observance of the legal culture.

2. THE THREAT TO THE RULE OF LAW IN THE COUNCIL OF EUROPE MEMBER STATES. CASE OF POLAND

The Report of the Parliamentary Assembly on the states experiencing a threat to the rule of law mentions Poland next to countries such as Bulgaria, Moldova,

[3] Report on the rule of law – European Commission for Democracy through Law (Venice Commission Study No. 512/2009, adopted at the plenary session 25-26 March 2011).

[4] The rule of law checklist adopted by the Venice Commission at its 106 Plenary Session (Venice 11-12 March 2016).

[5] Communication from the European Commission to the European Parliament and the Council „A new framework to strengthen the rule of law", COM (2014) 158 final.

Rumania or Turkey[6], and points to the violations of the rule of the independence of the judiciary, as well as to the fact that the recommendations of the Venice Commission on the Constitutional Tribunal have not been implemented. Mechanisms have been indicated which would help guarantee the principle of the rule of law and prevent the dismantling of court institutions.

Taking into account the numerous threats to the rule of law, it has been recognised that it is a danger of a systemic nature. This problem is mentioned in numerous documents and monitoring reports of the Council of Europe organs[7].

Apart from the opinions of the Venice Commission that indicate numerous violations of the rule of law in reference to the reforms of the system of justice, there are also GRECO reports which present evaluations of reforms from the point of view of corruption prevention. In recent years, the recommendations for Poland underlined the fact that the changes introduced in the field of the new retirement age of judges, the disciplinary procedures, nominations of presidents and deputy presidents of common courts as well as the manner of adopting law, all indicate that there is a risk of corruption[8].

GRECO is an organ of the Council of Europe for the prevention of corruption. It should be mentioned that the report on Poland has been prepared on the basis of the so called rule 34. It is an extremely rare case and is applicable in a situation of utmost danger where changes in law in a given state can generate threat of increased corruption. This special case now is Poland. GRECO has also indicated the unfavourable changes introduced in reference to common courts, the National Council of the Judiciary and the Supreme Court, which infringe the principle of the separation of powers, give a privileged position to the executive branch, and paralyse the system of justice. What has also been taken a note of is that even the most fundamental principle of the Council of Europe, i.e. the election of 50% of the National Council of the Judiciary by peer judges, has been violated. The introduction of a chamber in the Supreme Court which is to deal with the extraordinary complaints and the very construction of such a complaint make it possible to move proceedings which have been completed after 1997, thus constituting a grave infringement of the principles of the Council of Europe. Furthermore, the system of disciplinary proceedings against judges has been shaped by, among others, the act of law on the Supreme Court and is yet another serious violation of the fundamental principles of the Council of Europe and a grave threat to the state and rule of law.

The accumulated effect of the numerous opinions of European organisations addressed to Poland in relation to the violation of the independence of the judici-

[6] New threats to the Rule of Law in the Council of Europe Member States: selected examples, doc. 14405, 25 September 2017.

[7] State of Democracy, Human Rights and the Rule of Law. Role of institutions. Threats to institutions, Report of the General Secretary of the Council of Europe 2018.

[8] Ad hoc Report on Poland (Rule 34), Greco-AdHocRep(2018)1.

ary can also be observed in the Report of the UN Special Rapporteur on the independence of judges and lawyers[9].

The report illustrates the deeply reaching destructive actions against the system of justice in Poland. The Special Rapporteur has referred to the reform of the entire system of justice.

In the process of reforms, as the Special Rapporteur has underlined, it is necessary to have the participation of not only the judicial, legislative, and executive powers, but also the country's Commissioner for Human Rights and the civil society. Reforms should take place in line with the recommendations of the OSCE/ODIHR, the Venice Commission, and the European Commission. What is also mentioned in the report is the political climate of the reforms implemented, in the spirit of a broad scale campaign against the courts and undermining public trust to courts in Poland. The report also mentions the Constitutional Tribunal, whose composition and publication of judgements has been left in the remit of the executive power.

As far as the act of law on the system of common courts is concerned, the discretionary rights of the Minister of Justice in nominating and removing presidents of courts was criticised, as well as the introduction of a new retirement age for judges and the discretionary entitlements of the Minister of Justice in prolonging the active careers of judges up to the age of 70. Issues concerning the retirement age are related not only to the judges of common courts but also to the judges of the Supreme Court who, pursuant to the new act of law, are to retire at the age of 65 unless the President accepts their request to continue their adjudicating activity until the age of 70. Moreover, the termination of the constitutionally guaranteed term in office of the First President of the Supreme Court and the automatic immediate retirement of judges from the Military Chamber, the introduction of judges to the Chamber dealing with extraordinary complaints and to the Disciplinary Chamber have also been a cause of strong objections of the Rapporteur.

Other issues that met with strong criticism are the regulations on the National Council of the Judiciary, which has been underlined by, for example, the Polish Section of the Commission of Lawyers as well as the Consultative Council of European Judges[10].

In July 2018, the European Commission launched a procedure against Poland in reference to the adoption of the act of law on the Supreme Court. The basic issue argued by the Commission was the lowering of the retirement age of judges and the violation of the principles regarding the tenure of the First President of the Supreme Court. At the same time, the Supreme Court addressed the Court of Justice with prejudicial questions regarding the problem of the lowering of the retirement age of judges and the fear of violating the directive on equal

[9] Report of the Special Rapporteur on the independence of judges and lawyers on his mission to Poland, A/HRC/38/38/Add.1, 18 June-6 July 2018.

[10] CCJE BU (2017)5 REV. – 7 April 2017.

treatment in employment and work. The Supreme Court turned to the CJEU asking to apply a fast-track procedure in revolving the said case. At the same time, it was decided to apply the Code of Civil Procedure and to suspend the act of law on the Supreme Court in reference to the judges who would have to leave on retirement. The CJEU will decide soon in case of the National Council of Judiciary. This all created the background of a very serious dispute between the Supreme Court, the Supreme Administrative Court and common courts, and the politicians of the party in power with regard not only to the judges who were to leave on retirement but also to the tenure of the First President of the Supreme Court, which was planned to be terminated despite its 6-year time guarantee provided for by the Constitution, and other fundamental issues like the competence of the National Council of Judiciary.

The prejudicial questions asked by the Supreme Court and the common courts turned out to be an extremely effective legal instrument and a weapon in "defending" domestic courts. It can be expected that such questions will be posed to the CJEU ever more often and that the Court's responses will help defend the independence of the system of justice. The most effective instrument strengthening the independence of the system of justice and the impartiality of judges is the procedure against the state launched by the European Commission. It is set forth in Article 258 of the Treaty on the Functioning of the European Union and makes it possible for a state to withdraw from provisions of law which are in violation of the European legal solutions. At the same time, remembering of the duty to ensure effectiveness of the EU law, the CJEU can also impose an obligation on a state to implement the so called interim measures[11]. It should be underlined that assuring the impartiality of judges and the independence of courts can also be executed in a procedure before the European Court of Human Rights. In other words, the existing European safeguards of the independence of the system of justice and impartiality of judges can be a very effective form, though not the only one, halting the destruction of the principles of the rule of law and, in particular, the system of justice. There is an urgent need to arrange for a permanent monitoring of the observance of the basic values guaranteed in Article 2 of the Treaty on the European Union by the countries. It should be underlined, however, that the initial actions undertaken by the European Commission and the CJEU against Poland have effectively stopped the violation of law aimed at the Polish Supreme Court. However, there are many other guarantees to enforce respect of the rule of law, human rights and democracy in all the member states of the Council of Europe which can be used by all institutions of the Council of Europe. The most efficient one is of course the jurisprudence of the ECHR but we should also mention other type of instruments like Commissioner's for Human Rights

[11] Such measures have been applied in the procedure against Poland which made it possible for the judges to return from retirement.

reports, Parliamentary Assembly's reports, reports of the Conference of INGOs, CPT, GRECO, etc. All these reports create a critical mass illustrating the level of dismantling of the institutions of the member states and backsliding of their basic standards[12]. What should be done to ensure a better implementation of these recommendations? It is the most important challenge for the EU and the Council of Europe nowadays. Without a better coherence and a closer cooperation between the EU and the Council of Europe as well as the UN bodies a full respect for democracy, the rule of law and human rights will not be ensured.

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Summary

The rule of law, human rights, and democracy are the three pillars of functioning of the European states. The concept of the rule of law is very deeply rooted in the idea

[12] The European Parliament has adopted a resolution on the need to create a complex EU mechanism for the protection of democracy, Rule of Law, and fundamental rights, 14.11.2018.

of the European integration since 1949 when the Council of Europe was established. The rule of law is understood as: respect for the separation of powers, duty for the executive power to respect law, observance of the rule of the compliance with the law, respect for legal certainty and the principle of *res iudicata*, maintenance of judicial control of the executive power, exercise of the right to court ,guarantee of a fair trial and existence of an effective appeals remedy. In many countries rule of law are in danger. That is why European safeguards plays an important role.European safeguards means different instruments in form of monitoring reports of the Council of Europe institutions , opinion of the Venice Commission, fact finding missions etc. which creates a critical illustration of the situation of the member states. The EU law creates the legal procedures based on the art. 7 of the EU Treaty as well as on the art. 258 of the Treaty of the Functioning of the EU which effectively can stop rule of law backsliding in the EU countries. On the side of the member states of the EU the preliminary ruling procedure can effectively stopped the violation of the EU law and principles. European safeguards are not limited to the European institutions. The UN reports on democracy, rule of law and human rights contribute fundamentally to the proper implementation of these principles. In order to respect fully the rule of law, democracy and human rights a closer cooperation and a better coherence is needed. The way how the violation of the rule of law, democracy and human rights were limited in Poland shows the importance and effectiveness of the European the European safeguards.

KEYWORDS

independence of judiciary, preservation of the rule of law, European safeguards of the system of justice, respect for human rights

Streszczenie

Rządy prawa, prawa człowieka i demokracja to trzy filary, na których opiera się funkcjonowanie państw europejskich. Idea rządów prawa jest głęboko zakorzeniona w filozofii integracji europejskiej od czasu ustanowienia Rady Europy, a więc od 1949 roku. Rządy prawa są rozumiane jako poszanowanie dla podziału władz, obowiązek władzy wykonawczej respektowania prawa, zachowanie zasady działania zgodnego z prawem, poszanowania pewności prawa i zasady *res iudicata*, zachowanie sądowej kontroli egzekutywy, realizowanie prawa do sądu, gwarancja rzetelnego procesu oraz istnienie skutecznego środka odwoławczego. W wielu państwach rządy prawa są zagrożone. Dlatego europejskie zabezpieczenia spełniają ważną rolę. Należy je rozumieć jako różne instrumenty w postaci raportów monitoringowych instytucji Rady Europy, opinii Komisji Weneckiej, misji mającej na celu ocenę sytuacji w danym państwie. Tworzą one pewien krytyczny obraz pozwalający na obiektywną ocenę funkcjonowania państwa,

jego instytucji i prawa. Prawo UE stworzyło procedury na podstawie art. 7 Traktatu o Unii Europejskiej, art. 258 Traktatu o Funkcjonowaniu Unii Europejskiej, które mogą efektywnie powstrzymać naruszenia zasady rządów prawa w państwach członkowskich. Istnieje również instytucja pytań prejudycjalnych, które także mogą taką rolę spełnić. Europejskie zabezpieczenia to także raporty ONZ dotyczące rządów prawa, praw człowieka i demokracji, które przyczyniają się do właściwego stosowania tych zasad. Aby jednak proces hamowania naruszeń rządów prawa, demokracji i praw człowieka był bardziej skuteczny niezbędna jest bliższa współpraca i koordynacja podejmowanych działań. Dotychczasowe doświadczenia dotyczące ograniczania naruszeń tych zasad w Polsce wskazują na wagę i skuteczność oddziaływania europejskich zabezpieczeń.

SŁOWA KLUCZOWE

niezależność wymiaru sprawiedliwości, zachowanie rządów prawa, europejskie zabezpieczenie systemu wymiaru sprawiedliwości, poszanowanie rządów prawa