

New Avenues Rule of Law Report

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I am here in my capacity of President of the European Association of Judges.

The EAJ represents national associations or similar bodies from 44 European countries. We are a regional branch of the International Association of Judges; founded 68 years ago, the IAJ was a product of the aftermath of the Second World War.

Created a few years after the approval of the Declaration of Human Rights, the world knew, back then, that a future of peace and prosperity depended on upholding essential democratic values, now yet again at risk.

Our main mission, - and since day one as an entirely apolitical organization –, is very clear: to promote judicial independence: a fundamental concept, not open to interpretation, juridically established on European Union Law and by the detailed jurisprudence of the European Court of Justice (ECJ).

Judicial independence depends on the free exercise of our judicial duties without any external coercion. This concept of “negative freedom” to allude to Isaiah Berlin’s concept constitutes the DNA of judges in order to comply with fundamental responsibilities towards our fellow citizens.

Being such a plural organization, one of our major assets is precisely to represent a diversity of judiciaries. For instance, the contribution of EAJ to the Rule of Law Report was drafted by a pool of judges, experts on this area, from a wide range of juridical traditions: Austria, France, Estonia, Germany, Ireland, Poland, Portugal, Slovenia, Switzerland and the United Kingdom.

My colleagues produced a document for this event commenting on the Rule of Law report tackling their internal structure. These remarks constitute a separate document that I already sent to the LIBE Committee for your better analysis.

It is my role to address the structural problems detected by EAJ on the Report searching for new avenues.

In general terms, it should be mentioned a positive note of these Reports on emphasizing the importance of a Rule of Law Culture.

It is indisputable that, in recent years, judicial independence gained a central stage in European Union and it is imperative to gather all the tools to affirm this basic value.

However, there are relevant negative aspects to highlight causing added problems particularly in those countries where Rule of Law needs an “intensive care unit” to survive.

In our assessment, the RoL reports tend to misplace energies that should be concentrated on the enforcement of the EU Treaties and implied the loss of the EU’s “momentum” regarding the upholding of the Rule of Law, boosted namely by the LIBE Committee Reports.

In this aspect, I fully endorse the remarks and very clear warnings pointed out by Professors Laurent Pech and Petra Bard in several academic papers.

To concentrate in some nuclear expressions used on this regard about the Report:

“a language of euphemisms and understatement”; “failure to see the wood for the trees”; “failure to point at interlinked system errors”.

In the end, the “normalising of the abnormal” meant by the latter the systemic annihilation of the principle of separation of powers, namely in Poland and Hungary; that was the reason EAJ urged recently for a Marshall Plan for Rule of Law in Europe.

Having in mind this critical context, unfortunately, the RoL report seriously risks to procrastinate, if not devalue, the real problem we all are facing; the consequences of this insufficient approach are at plain sight as detected in the past weeks.

The main menaces on judicial independence have recently concerted in areas like appointment for Superior Courts (Constitutional Tribunals and Supreme Courts), the nomination of Court Presidents, the vast and increasing political interferences on Judicial Councils and the use of disciplinary and criminal procedures (by lifting of judicial immunities) against independent judges. The arbitrariness of case allocations, a crucial factor for the impartiality of judicial systems, is also endangered.

In a context of the decay of pluralism and democracy, the judiciary is facing concurrently in several countries, not only the two mentioned, an artificial and undue criticism with harsh attacks on courts, particularly focused on the more independent sectors, fueled by an instrumentalized public media and social media.

But let me present very concrete examples some of them occurred in the past few days. In Poland, the harassment of independent judges is now becoming more aggressive. On 16 March the Prosecutor's Office announced motions to waive immunity and to present criminal charges against yet three more judges including two from the Polish Supreme Court. Not surprisingly, one of them, Włodimierz Wróbel, has reached 50 on 95 votes by their peers for the position of President in the General Assembly of the Supreme Court. As you know, the President of Poland decided against the majority.

Meanwhile, there are additional legal amendments proposed by the Polish Government to decide on the composition of the Supreme Court benches for important cases and to appoint "loyal" Presidents for the Civil and Labour Chambers of Supreme Court.

The use of disciplinary procedures continues in order to obtain a chilling effect on judges being one of the intended purposes to avoid preliminary references to the European Court of Justice.

Besides all the many cases of persecution of judges publicly known (Judges Tuleya, Frackowiak, Morawiec, Pawel, etc), Irena Piotrowska and Aleksandra Janas, judges of the Court of Appeal in Katowice, are facing disciplinary proceedings for asking to the Supreme Court a legal question which was a consequence of a judgment by the European Court of Justice.

The chilling effect on Judges despite their courage and resilience is, inevitably, affecting the integrity of their work, creating a climate of fear and disbelief.

Recently for the General Assembly of Judges in Krakow there were about 130 judges on the attendance list for the assembly. However, for the approved resolution condemning attacks on judicial independence, only 23 dared to appear and vote favourably.

In Hungary, the extremely politized members of the "Constitutional Tribunal" can now automatically become Supreme Court Judges due to a legal amendment. The recent appointment of the President of the Kuria demands for immediate action from the European Commission to protect judicial independence in Hungary as strongly stated by the board of the European Network of Councils for the Judiciary.

On this very day it must be recognized that we have so-called “courts” or “tribunals” that cannot be considered as such for instance at constitutional level, but also with the example of Polish Supreme Court’s Disciplinary Chamber suspended by ECJ.

It is time to conclude by trying to answer the most essential question put to this panel: how the Commission should review its Rule of Law report to ensure it properly monitors the respect of Article 2 values.

The solution must be found by the political authorities within the EU and it is not for us, judges, to interfere on their decisions.

However, speaking in the name of the many menaced judges, most of them anonymous fighters for Rule of Law, there are possible ways forwards indicated by several experts:

The Commission could bundle cases addressing the systemic nature of the threats towards the fundamentals of Rule of Law, using a more systemic methodology; could accelerate and prioritize infringement procedures and make extensive use of interim measures and requests for pecuniary sanctions to ECJ.

In any case, the key word must be enforcement and not only monitoring.

Regarding EU institutions, when national courts are refusing judicial cooperation with Member States because of the lack of independence of their judiciaries adding to a framework within which judicial authorities, namely prosecutorial offices, lack any sort of autonomy from the government, it must be affirmed that the protection of fundamental rights of EU citizens is concretely in peril.

Therefore, regarding the European Parliament, EAJ expects a firm action to uphold EU essential values; the second edition of the RoL Report should really concentrate on the developments on the problems already detected in the first one and, particularly, on concrete recommendations in the end of each country chapter on the remedies to immediately apply under the scrutiny of European institutions including this Committee.

For us, as judges, professionally compelled to respect and enforce EU law, it is mandatory that all the requirements to be an EU member, in particular concerning rule of law and judicial independence, must, obviously, endure after becoming a member.

Otherwise, as the president of the European network of Presidents of Supreme Courts, the president of the European Network of Councils for the Judiciary and myself, as president of EAJ, expressed in a letter to the President of the European Commission, the European Union, as intended by its founding fathers, will simply cease to exist.