ELEMENTS AND DYNAMICS
OF THE
EUROPEAN LEGAL STANDARD

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The Conference "Elements and Dynamics of the European Legal Standard", Gdańsk, 18–19 April 2024

(photo: Sławomir Dajkowski)

Elements and Dynamics of the European Legal Standard, 18–19 April 2024

Introduction

The process of systemic transformation in Poland after 1989 was based on the continuous adaptation of Polish law and constitutional standards to European standards. Once Poland joined the Council of Europe, the point of reference was the European Convention on Human Rights (ECHR) and the standards resulting from the case law of the European Court of Human Rights (ECtHR). The Constitution of the Republic of Poland was adopted in this spirit, according respect to the standards that result from the ECHR, and the Constitutional Tribunal has repeatedly referred to and implemented Strasbourg standards in its rulings. Poland's accession to the European Union (including the implementation of the Copenhagen criteria) was an additional impetus to strengthen the attachment of Polish law and legal thinking to European standards. A new actor has appeared in the constitutional dialogue of the highest Polish court, that is the Court of Justice of the European Union (CJEU).

Basically, this process of continuous approximation to European standards, in the context of systemic rules and those related to the independence of the judiciary, proceeded without major disruptions until 2015. What is more, Poland even began to play a leading role in democratic transformation and European integration. The symbol of this was the Polish Presidency of the European Union in the second half of 2011, and in relation to the Council of Europe, its participation in strengthening the role of the ECtHR and the implementation of its judgments.[1]

However, the end of 2015 brought a dramatic change. The questioning of the constitutional role of the Constitutional Tribunal by the winner of the parliamentary elections, the Law and Justice Party, paved the way for further institutional changes. The most important ones included political subordination of the prosecutor's office (together with the merger of the offices of the Minister of Justice and the Prosecutor General), taking control of the public media, abolishing the independence of the civil service, and then limiting the independence of the judiciary. Following the example of Hungary, the salami method was used: cutting off the independence of individual institutions and legal bodies step by

[1] The first experimental judgments actually applied to Poland. Poland also organized the Warsaw seminars on the role of the ECtHR.

step, replacing legal guarantees with "political will." The Constitutional Tribunal in its new composition, under the chairmanship of Julia Przyłębska, became an exponent of a new constitutional standard, one far removed from previous European standards. This was expressed in the Constitutional Tribunal's decisions, questioning not only previous achievements, but also undermining the validity of the Treaty on European Union and the European Convention on Human Rights in Poland. In this situation, the defenders of democratic values faced a challenge: what to base an actual constitutional standard on, since official state bodies were simultaneously appropriating and impoverishing constitutional concepts. For civil society, the point of reference was the constitutional standard (especially in the area of the rule of law and the independence of the judiciary) developed in the case law of the Polish Constitutional Tribunal and Polish courts up to 2015, as well as the standards resulting from the case law of the ECtHR and the CJEU.

After the elections of 15 October 2023, Poland is facing a new challenge: how to rebuild the rule of law, while simultaneously facing complicated systemic and political circumstances. Building a model of illiberal democracy (or a model of abusive constitutionalism) has led to a kind of "laying a minefield" in some state bodies. This makes the process of dismantling difficult, but it is not the only problem. Any reconstruction of the rule of law must take place in accordance with the principles of the rule of law. Therefore, there can be no shortcuts, especially not methods based on violence that bypass the applicable legislation. Finally, the question arises as to what standards to refer to this time, especially the question as to whether the existing case law of the ECtHR or that of the CJEU, or international soft law standards provide answers to the dilemmas related to the challenges of any transitional period.[2] Thus, it appears that the process of restoring the rule of law may in itself set a new standard for the transition from a model of illiberal democracy to a state governed by the rule of law.

1. The standard of the independence of the judiciary in the case law of the CJEU

With regard to the standard of judicial independence under EU law, it is worth noting that its most important elements are the guarantees arising from the EU treaties relating to the independence of the CJEU, as well as the normative content establishing the right to a fair trial, set out in Article 47 of the Charter of Fundamental Rights of the EU. However, in fact, EU law has not paid much attention to what standard of judicial independence should be expected from national courts. For example, when in 2012 Victor Orban made his first attack on the independence

2 This is the subject of a book published prior to the Polish elections. See: M. Bobek, A. Bodnar, A. von Bogdandy, P. Sonnevend (eds.), *Transitions 2.0: Re-establishing Constitutional Democracy in EU Member States*, Baden-Baden 2023.

of the judiciary in Hungary, by lowering the retirement age of judges, the case was assessed in terms of age discrimination, and not in terms of the political and constitutional system.[3] More than five years later, the CJEU completely changed its approach. In the case concerning the reduction of salaries for judges from Portugal,[4] the CJEU found in February 2018 that threats to the independence of the judiciary in individual Member States should be analyzed in light of the principle of the effectiveness of Community law, resulting from Article 19 of the Treaty on European Union. Although the Portuguese judges did not win their case, the standard from the ASJP (*Associação Sindical dos Juízes Portugueses*) case was used to create an entire line of case law relating to various national threats to the independence of the judiciary. Those "passing the ball" on to the CJEU were the European Commission, through the procedure set out in Article 267 TFEU, and also Polish courts through numerous requests for preliminary rulings. Courts from other countries also played a certain role, referring requests for preliminary rulings relating to the independence of the judiciary in connection with doubts regarding the application of the European Arrest Warrant. As a result, the CJEU led to the blocking of some reforms of the Polish judiciary (for example, sending Supreme Court judges into early retirement[5]), questioned the disciplinary mechanisms applied to judges,[6] and the politicization of the judicial nomination process. In principle, to this day, the CJEU is still assessing changes in the Polish judiciary, and indirectly shaping the EU standard that should apply to respecting the principle of judicial independence in individual Member States. The quintessence of the path taken by the CJEU was its judgment of 16 February 2022, delivered by the full bench,[7] in which the CJEU summarizes its case law and emphasizes the importance of Article 19 TEU for the protection of judicial independence: "[…] the second subparagraph of Article 19(1) TEU, interpreted in the light of Article 47 of the Charter, imposes on the Member States a clear and precise obligation as to the result to be achieved that is not subject to any condition as regards the independence which must characterise the courts called upon to interpret and apply EU law."[8]

The standard shaped by the CJEU directly influenced the political and legal actions of the EU bodies and institutions. The European Commission could have taken further actions related to the infringement of the Treaties by the Polish authorities in relation to reform of the judiciary. It could also have assessed these

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3 C-286/12, *European Commission v. Hungary*, judgment of 6 December 2012.

4 C-64-16, *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*, judgment of 27 February 2018.

5 C-619/18, *European Commission v. Republic of Poland*, judgment of 24 June 2019; cf. also the interim measure of 19 October 2018.

6 C-791/19, *European Commission v. Republic of Poland*, judgment of 15 July 2021, relating to the independence of the Disciplinary Chamber of the Supreme Court; cf. also the interim measure of 8 April 2020.

7 C-157/21, *Poland v. Parliament and Council*, judgment of 16 February 2022.

8 Paragraph 198 of the judgment.

changes in subsequent editions of the Rule of Law Reports. CJEU case law also influenced the discussions and political actions taken at the level of the EU Council under the procedure set out in Article 7 TEU. Finally, inadequate implementation of CJEU judgments was the reason for suspending the payment of funds to Poland from the National Recovery Plan.

It is worth noting that the dynamic situation in terms of the development of the standard of an independent judicial system (and its enforcement) did not go unnoticed by the Polish authorities at the time. Leaving political statements aside, it is worth noting the actions of the Constitutional Tribunal, which questioned the constitutionality of the provisions of the Treaty on European Union relating to the independence of the judiciary.[9] The Constitutional Tribunal judgments were used by the Polish Government as a weapon questioning the actions of EU bodies and institutions in relation to the Polish judiciary. They had little in common with the activities of the independent Constitutional Tribunal before 2015 and in themselves deepened the constitutional crisis in Poland, while undermining the foundations of Poland's membership of the EU. Therefore, referring to the experience of the former independent Constitutional Tribunal and seeing the CJEU as a quasi-constitutional court for Poland gained all the more importance in public debate.

In retrospect, there is no doubt that the CJEU case law was one of the most important mechanisms for defending the independence of the Polish judiciary. Thanks to the hope stemming from successive interim measures and CJEU judgments, civil society and politicians were able consistently to demand that democratic standards be met in Poland, and judges were able to defend themselves against repression and emphasize their attachment to the Constitution and EU law. In turn, after the elections of 15 October 2023 existing case law, supplemented by new judgments of the CJEU,[10] constitutes a standard of reference in terms of repairing the Polish judiciary.

2. The *Ástráðsson* standard and its influence on shaping the standard of judicial independence of the ECtHR

The ECtHR has been shaping the standards of an independent judiciary for many years, in light of an interpretation of Article 6 of the ECHR. These standards concern issues such as the application of disciplinary proceedings against judges, guarantees of freedom of speech, evaluation and lustration procedures, and nomination mechanisms. However, these rulings were quite scattered before 2015

9 Cf. especially: judgment of 14 July 2021, P 7/20, relating to an order for interim measures issued by the CJEU, and judgment of 7 October 2021, K 3/21.

10 Cf., for example: C-326/23, *C.W.S.A. and others v. Prezes Urzędu Ochrony Konkurencji i Konsumentów*, judgment of 7 November 2024.

and did not create a single, coherent system of judgments. Therefore, when cases from Poland appeared concerning an attack on the independence of the judiciary, the ECtHR also had an opportunity to set standards. In some cases, it expanded the previous line of judgments (for example, with regard to disciplinary proceedings against judges[11] and guarantees of freedom of speech[12]). However, the ECtHR's approach to the problem of judicial nominations, and in particular the influence of the executive power on the independence of the judiciary, became a milestone. In the case of *Ástráðsson v. Iceland*[13] of 1 December 2020, the ECtHR (Grand Chamber) precisely indicated what criteria must be met so that the nomination process for judges is not subject to excessive political influence. Similarly to the ASJP case decided by the CJEU, the standard created was used more by Polish judges than in this case by those from Iceland (since the problem there concerned only a few people). In subsequent rulings, the ECtHR began to assess the influence of the National Council of the Judiciary (NCJ) in its composition established after 2018 on judicial nominations and on guarantees of the right to a fair trial.[14] It also dealt with the status of the NCJ itself.[15] It also began to issue precedent-setting interim orders suspending the tools of repression employed against Polish judges.[16] The best summary of the ECHR's efforts was the pilot judgment in the *Wałęsa v. Poland* case.[17] Róbert Spanó, then President of the ECtHR, emphasizes that in fact the development of the ECtHR's case law on the independence of the judiciary has an impact on the protection of the entire system of the ECHR and has also become intertwined with the activities of the CJEU.[18]

It is worth noting that the formation of new standards on the part of the ECtHR also met with criticism from the Polish Constitutional Tribunal. However, in this case, the Constitutional Tribunal not only defended the "achievements" of the reform activities of the previous government, but also referred to its own status. One of the judgments of the ECtHR (*Xero Flor v. Poland*)[19] concerned the status of understudy judges. Therefore, in two judgments, the Constitutional Tribunal

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11 *Tuleya v. Poland*, applications nos 21181/19 and 51751/20, judgment of 6 July 2023.

12 *Waldemar Żurek v. Poland*, application no. 39650/18, judgment of 16 June 2022.

13 *Guðmundur Andri Ástráðsson v. Iceland*, application no. 26374/18, judgment of 1 December 2020.

14 Cf. For example: *Advance Pharma Sp. z o.o. v. Republic of Poland*, application no. 1469/20, judgment of 3 February 2022.

15 *Grzęda v. Poland*, application no. 43572/18, judgment of 15 March 2022.

16 The cases of judges: A. Synakiewicz (46453/21), A. Niklas-Bibik (8687/22), M. Piekarska-Drążek (8076/22) and J. Hetnarowicz-Sikora (9988/22), interim measure from 22 March 2022; cf. also the case of Włodzimierz Wróbel (application no. 6904/22), interim measure of 8 February 2022.

17 *Wałęsa v. Poland*, application no. 50849/21, judgment of 23 November 2023.

18 R. Spanó, "The Rule of Law as the Lodestar of the European Convention on Human Rights: The Strasbourg Court and the Independence of the Judiciary," *European Law Journal* 2021, vol. 27, pp. 211–227.

19 *Xero Flor v. Poland*, application no. 4907/18, judgment of 7 May 2021.

undermined the validity of the ECHR in Poland.[20] Once again, the Constitutional Tribunal did its bit to produce discord between the actual constitutional standard and the European one, thereby serving to build an illiberal democracy.

The new government that was formed on 13 December 2023 declared on the very first day that it would not challenge the judgment in the *Wałęsa v. Poland* case. As with CJEU case law, the standards established by the ECtHR constitute a point of reference for reforms aimed at repairing the Polish judiciary. However, because of the more diverse nature of those reforms, and the individualized character of violations, their implementation goes beyond what can be settled by a legal norm. For example, cases concerning disciplinary repression or suspension of judges (Igor Tuleya and Paweł Juszczyszyn) also require the application of mechanisms of accountability vis-à-vis those guilty of violations, as well as compensatory measures.

3. Standards in re-building the state governed by the rule of law after the elections of 15 October 2023

This sketch of the development of the standards of the CJEU and the ECtHR shows the extraordinary dynamics of what happened between 2016 and 2023. One could advance the argument that the Polish constitutional crisis indirectly led to the strengthening of European standards. Poland became a kind of laboratory of change, thanks to which the European Union gained new instruments (such as reports on the rule of law, the practice of applying an anti-infringement procedure, or conditionality mechanisms). In turn, the ECtHR was able strongly to link standards of human rights protection with the principles of the rule of law and the independence of the judiciary. It should not be forgotten that other institutions actively participated in this process of assessing the Polish transformations, with the Venice Commission assuming a special, even a historic role. But one should also not forget about the Organization for Security and Cooperation in Europe's Office for Democratic Institutions and Human Rights or the UN Special Rapporteur on the Independence of the Judiciary.

This long-standing legacy must necessarily have an impact on the process of change after the elections of 15 October 2023. First, the case law standards of both the CJEU and the ECtHR and the soft law standards of the Venice Commission (especially the Rule of Law Checklist) must be a point of reference in the process of repairing the state. Second, the involvement of these courts and institutions in stopping the destruction of the rule of law must mean that they cannot be bypassed on the road back to the rule of law. Third, the way back itself is exceptional and unprecedented in nature, and, therefore, can indirectly serve to create new standards.

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[20] Judgment of 24 October 2021, K 6/21; judgment of 10 March 2022, K 7/21.

After the first year of reforms, it is already possible to make some observations. The most important challenge is the process of the re-evaluation of judges appointed as a result of the nomination of the so-called neo-NCJ. It may seem that this is a relatively simple process to plan, because evaluation and lustration procedures concerning judges have been carried out in other countries previously. However, existing standards and practices refer to the assessment of the historical conditions of judicial appointments (vetting of communist judges) or to the evaluation of judges tainted by corruption. But the Polish problem is similar to the *Ástráðsson* case, involving the executive's excessive influence on the judicial nomination process. However, the scale is quite different, because it concerns not a few judges, but over three thousand (appointed at different times and with heterogeneous status). A possible negative verification is associated with other consequences: the issue of the validity of judgments issued with the participation of these judges. Finally, the solution to this problem is related to the approach to the principle of legalism. If a given person received a judicial nomination in accordance with formal rules, can this be challenged after the passage of time? A similar dilemma concerns the shortening of the term of office of current members of the NCJ, who were appointed to this body in a questionable manner. Can they be dismissed by statute? The Venice Commission responds to these dilemmas by pointing out that repairing the rule of law must take place in accordance with the principles of the rule of law. But, in essence, it must come down to balancing different values and finding the best solutions.[21] Poland is, therefore, once again a laboratory for shaping democratic standards: this time a return to the rule of law after a period of constitutional, illiberal crisis.

What is more, Poland now bears an even greater responsibility. When the foundations of the liberal democratic order around the world are crumbling, when geopolitical challenges are leading to chaos and a sense of threat, the European Union must be all the stronger. And this will not be possible without a Poland that is governed by the rule of law, sending a clear signal to the entire community of European states.

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[21] "The Venice Commission wishes to stress in this respect that any measure taken with a view to 'restoring' the rule of law has to meet the overall requirements of the rule of law. However, in this context some balancing between different – apparently conflicting – rule of law principles is required." Urgent Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law of the Council of Europe on the draft law amending the Law on the National Council of the Judiciary of Poland, 8 May 2024, CDL-AD(2024)018.