

OBSERVATIONS ON RULE OF LAW

Further to the discussion on the *LIBE committee mission to Poland on the rule of law* that took place at the GUE/NGL group meeting on 17 October, this briefing aims to describe the most **relevant aspects of the mission** and to provide some **general thoughts** that could be useful for further debate on the concept of the Rule of law and the challenges EU countries are currently facing.

1. Conclusions on the most relevant aspects of the mission to Poland

A delegation from the LIBE committee visited Poland on 19-21 September to gather insights into the latest developments as regards the rule of law, fundamental rights and democracy in the country. The delegation was composed of MEP Claude Moraes (S&D, Chair of the delegation), MEP Frank Engel (EPP), MEP Valdemar Tomaševski (ECR), MEP Judith Sargentini (Greens/EFA), MEP Barbara Spinelli (GUE/NGL), MEP Joëlle Bergeron (EFDD) and MEP Nicolas Bay (ENF).

After a wide range of meetings with representatives of the Polish government and judiciary, Poland's ombudsman, and representatives of other authorities, organisations, stakeholders, media representatives and women's rights activists, these are the most significant elements that should be highlighted:

- There is a clear political interference in the judiciary. It was quite clear from the meetings we had that under the so-called "reform of the justice system", the Government of Poland has adopted a set of laws aiming to replace judges, especially at the higher levels. In other words, the objective of the ruling party is to control the courts. Stakeholders informed us of developments, making remarks such as "we do not have a Constitutional Court anymore", "prosecutors working for the Minister of Justice are now judges in the Supreme Court", "I am a lawyer and I need an independent judge to solve my cases", etc.
- The independence of the judiciary and the interference of the executive power in the judiciary are concepts seemingly far from citizens' everyday lives. It is very difficult for Polish citizens to understand how they can be affected by the replacements taking place in Polish courts, but legal experts, lawyers and associations have stressed the deep impact that such political "capture" of the judiciary will have on citizens' capacity to have access to independent justice and to appeal sentences. As a matter of fact, a daily demonstration takes place at the entrance of the Supreme Court to denounce the consequences of the new Polish law on the Supreme Court that will be described later in the text.

Moreover, it is crucial for citizens to understand this, since it seems to be the only instance in which the European Commission triggered Article 7 (1) or referred a country (in this case Poland) to the European Court of Justice (ECJ), as it did on 24 September in order to protect the independence of the Polish Supreme Court. Romania could be

the next in line. On 19-20 October, the Venice Commission issued an Opinion¹ on Romania's justice reform. It stresses that many draft amendments to the Criminal Code and the Criminal Procedure Code could significantly weaken the criminal justice system and its effectiveness, in particular the investigation, prosecution and adjudication of corruption and other serious forms of crime.

- Most interlocutors (the Ombudsman, the associations of lawyers, etc) pin their hopes on the ECJ, knowing the difficulties of applying art. 7.
- In this sense, it was very impressive to hear the representatives from Free Courts explaining that by screening short films they are trying to explain to society what is going on in the judiciary.
- In this scenario, it is easier for the Polish government to divert citizens' attention to everyday issues and gather their votes by putting in place social and economic policies that could be beneficial for society.
- Fundamental rights violations are taking place in Poland. We had the opportunity to meet with different stakeholders in this regard including the President of the Supreme Court Mrs. Gersdorf.

In April 2018, the new Polish "Law on the Supreme Court" entered into force. Under that law, the retirement age for Supreme Court judges has been lowered to 65. Serving Supreme Court judges who reached the age of 65 before the Law entered into force or, at the latest, on 3 July 2018, were required to retire on 4 July 2018. If judges beyond the age of 65 would like to continue in active judicial service, they had to submit a request and a medical certificate that must be consented to by the President of Poland – who is not bound by any criteria and his decision is not subject to any form of judicial review.

Accordingly, Mrs. Gerdorf was dismissed. However, she refused to abide by this law, referring to the duration of the mandate fixed by the Constitution.

On 2 October 2018 the European Commission brought an action for failure to fulfil obligations before the ECJ. The Commission considered that the new Polish law has infringed EU law and has requested the Court, in the context of interim proceedings and among other measures, to order Poland to suspend the application of the provisions of this national legislation.

On 19 October, the ECJ ruled that Poland must immediately suspend the application of the provisions of the national legislation relating to the lowering of the retirement age for Supreme Court judges².

- We also met with the Ombudsman Adam Bodnar, black protest activists, Polish journalists, Citizens of Poland etc. The ideological aim of such a take-over of the

¹ Opinion [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2018\)021-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2018)021-e)

² Press release <https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-10/cp180159en.pdf>

judiciary, explained to us by members of the ruling majority, is the never-ending reckoning with the Communist past.

2. On a more general note about the Rule of law:

Due to the ongoing rule of law challenges in EU countries and in view of a possible group reflection on this matter, our shadow for most of the rule of law files, Barbara Spinelli, would like to bring the following observations to the Group's attention for possible further discussion:

- Values of Article 2 TEU are being challenged in many EU countries but the rule of law alarm seems to ring only in some of them.
- The approach of the European Parliament on rule of law issues is far from neutral. The "Rule of law border" moves to the east and it does so quicker now that elections are approaching.
- Corruption and rule of law provisions are a kind of odds-and-ends box that enables the European Parliament to act sometimes as if it was a police body.
- Systematic fundamental rights violations may be more difficult to prove in an EU country but this does not mean that they do not exist: they are less formalised than rule of law infringements but equally crucial.
- EU institutions often assume that fundamental rights violations can only happen when the rule of law is challenged. However, we can see systematic or serious fundamental rights violations when the technical standard of rule of law is still being met.

To further illustrate this idea, please see the following extract from the open letter on Upholding the rule of law in the European Union after the events on 1 October last year in Catalonia.

The actions of the Spanish government cannot be justified as protecting the Rule of Law, even if based on specific legal provisions. In contrast to rule-by-law (rule by means of norms enacted through a correct legal procedure or issued by a public authority), Rule of Law implies also the safeguarding of fundamental rights and freedoms—norms which render the law binding not simply because it is procedurally correct but enshrines justice. It is the Rule of Law, thus understood, that provides legitimacy to public authority in liberal democracies³.

- The concept of rule of law is often misused. In the most advanced definitions, rule of law includes fundamental human rights. One of the biggest challenges is ensuring EU institutions denounce and initiate actions/respond when fundamental rights are violated.

³Open letter to Commission President Juncker and European Council President Tusk on *Upholding the rule of law in the European Union*, Albena Azmanova (University of Kent) and MEP Barbara Spinelli, 3 November. http://barbara-spinelli.it/wp-content/uploads/Letter-Catalonia-3Nov_EN.pdf

- Rule of law challenges in the EU are evident, however the response from the EU institutions has been far from clear, consistent or effective, and has clearly not been impartial. On the contrary, the EU's response often seems to be politically selective.
- Rule of law is not the only value enshrined in Article 2 TEU. It is vital to set up a rapid response mechanism on violations of fundamental rights. These violations should be made visible and the mechanism of EU surveillance should not be perceived by Member States as punitive and should be completely independent from party-politics.