

European Commission Annual Rule of Law Report – stakeholder consultation

Contribution of the International Association of Judges (IAJ)/European Association of Judges (EAJ)

I.) HORIZONTAL DEVELOPMENTS

The EAJ is honoured to respond to this Stakeholder- Consultation.

In order better to inform its response the EAJ requested its member associations in the Member States of the European Union to respond to the questionnaire and has prepared the summary of the responses set out below.

The EAJ, which has 44 member associations, regularly receives reports from its member associations on the state of the rule of law in their respective European countries and may be asked by member associations for support in their endeavours to resist infringements of the independence of the judiciary and the rule of law in their country.

As such, the EAJ is particularly conscious of the tendency of the executive power to seek to extend control over the judiciary and to reduce judicial scrutiny of government activities. That tendency is of course stronger in some political regimes and some societies than in others but even in countries with long established traditions of democracy and observance of the rule of law the inclination of the executive power to restrain the judicial power may yet be present.

The particular ways in which the independence of the judiciary and observance of the rule of law may be undermined are many and varied. In the experience of the EAJ, they include, among others, taking steps to make the appointment and promotion of judges subject to political considerations or control and restricting the transparency of such decisions; restricting the ability of the citizen to challenge administrative decisions or question the validity of legislative measures; impeding the right of judges to form professional associations; creating disincentives on judges from joining a professional association; subverting disciplinary procedures in order to bring sanctions against a judge on the basis that the judge's judicial decision is not acceptable; and instituting or encouraging unfounded criticism of the judiciary in the media. The last of these is of particular concern, since the judiciary has little legitimate means of responding to such media attacks or shielding its members from attack and it is the duty of responsible government to protect the judiciary against such unfounded attack. It is also important, in the view of the EAJ, to draw upon and to strengthen international standards on what is needed for an independent judiciary.

Turning more specifically to developments in the Member States since the beginning of 2019, regrettably the EAJ has required to intervene in regard to-

(a) The ongoing problems in the Republic of Poland. In that regard at its meetings on 10 May 2019 and 19 September 2019 the EAJ to pass resolutions pressing the Polish government to remedy matters (<https://www.iaj-uim.org/iuw/wp-content/uploads/2019/05/RESOLUTION-ON-POLAND-Copenhagen-10-May-2019.pdf> ;<https://www.iaj-uim.org/iuw/wp->

[content/uploads/2019/09/RESOLUTION-OF-THE-EAJ-CONCERNING-POLAND-NUR-SULTAN.pdf](#)). It has also taken further steps, such as the letter from its president to the President of the EU Commission (<https://www.iaj-uim.org/iuw/wp-content/uploads/2019/12/Letter-Poland -EU-Commission December-2019.pdf>).

(b) Issues arising in Hungary, which called for a fact-finding mission, the report of which was submitted by the EAJ to the Hungarian authorities. No action having followed the EAJ president wrote further to the EU Commission.

(c) Problems in Romania, particularly respecting proposals to reduce the pensions payable to retired judges. The EAJ again raised this matter by letter of 10/09/2019 (<https://www.iaj-uim.org/iuw/wp-content/uploads/2019/09/175-19-Open-Letter-to-EAJ.pdf>).

(d) Issues in respect of Bulgaria which led to a letter from the President of the EAJ to the EU Commission dated January 2020.

However, as is evident from the summary of responses which is set out below, the picture is not all negative. Some Member States are taking steps to enhance the rule of law – for example by increasing resources available to the judicial system, which in many countries have been sadly insufficient in recent years, or by improving legal aid. The EAJ naturally welcomes these and other positive measures.

Largely because of the timing of matters, the impact of the COVID-19 pandemic on the judiciary is only marginally reflected in this report.

In the past months, the European judges have been confronted in multiple ways by the COVID19 crisis. The challenges for judiciary have been exceptional: willingness to serve our fellow citizens, providing solidarity and support, in times of pestilence; the duty to supervise, as broadly as permitted by political authorities, the lawfulness of emergency measures; the emergent call to deal with the negative consequences of judicial lockdowns for the efficiency of courts and, moreover, the anxiety arising from the need to look after one's own health and that of others, in particular witnesses, litigants or other citizens present in court.

The EAJ expressed its concerns as to the preservation of the Rule of Law from the very beginning of the lockdowns due to the Corona 19 virus pandemic. It gave assurances of its engagement to the Rule of Law “regardless of the temptations prompted by the overwhelming power of technology and by the tendency for more controlled lives.” It declared an unequivocal readiness to defend human rights, civil liberties and equally protection against abuses in these times of emergency.

The pandemic crisis and the question how to deal with it and with its consequences will certainly represent one of the greatest challenges in the history of European Union – socially, economically, politically but also as to the Rule of Law and its fundamental nature. In recent years, the decline of the Rule of Law, namely the calculated destruction of judicial independence, at a spectacular level in well identified EU countries, has been constantly denounced by the European Association of Judges and many other international organizations. Thus, in this dramatic situation, it is a bold step taken by the EU – to which this stakeholder contribution to the EU-Commission Rule of Law Report pays tribute - namely to privilege and

enhance the Rule of Law rather than devalue it or simply disregard it within the European Union.¹

II.) POSITIVE DEVELOPMENTS and CHALLENGES in EU MEMBER STATES

I Justice System

A. Independence

1. Appointment and selection of judges and prosecutors

In February 2020 following instruction from Parliament in 2018 the government set up a committee to consider whether the number of justices of the Supreme Court and the Supreme Administrative Court should be fixed and whether the two supreme courts might hear cases jointly. A statutory maximum number of justices should protect the courts from undue changes. (Sweden)

Since 2017 there has been an ongoing debate about reform of the judicial appointment system, because there have been occasions in which it was widely thought that the government had been influenced by politics in choosing the person to be appointed from the list of suitable candidates drawn up by the Judicial Appointments Advisory Board. There was an agreement that political influence should be reduced. But these reform efforts were interrupted by the dissolution of parliament after general elections in February 2020. (Ireland).

The appointment of a new General Prosecutor was made in a way totally lacking in transparency. (Bulgaria)

2. Irremovability of judges, including transfers of judges and dismissal

There is a draft law which permits judges to be transferred to another court if that other court is over-burdened. (Estonia)

There was a change in the retirement of District Court Judges in 2019. Previously the retirement age for District Court Judges was 65 and could be prolonged for a year maximum five times by the Chief Justice. The new law changed the retirement age of District Court Judges to 70, as is already the case for judges of higher courts. (Ireland)

3. Promotion of judges and prosecutors

Both judges and the Association of Judges have claimed that there are no transparent criteria but there has been no reaction so far. (Estonia)

The procedure for selecting a candidate for the office of Prosecutor General was improved by the adoption of a law in February 2020. A greater transparency and the involvement of a wider range of experts was ensured. The main role in the procedure for interviewing and selecting the candidate is now entrusted to the Judicial Council. (Latvia)

¹ Cf Matos "A'Marshall Plan'for the Rule of Law in Europe". In: <https://verfassungsblog.de/author/jose-igreja-matos>

There was a recent change, which allows judges of District Courts to apply for any kind of higher court including the Supreme Court. This happens quite often. (Poland)

The President of the National Office for the Judiciary, which is responsible for the administration of justice, is appointed by the parliament. On several occasions during 2019 she disregarded legal provisions regarding the appointment of presidents of courts or chambers either by not involving the National Council of the Judiciary, which is composed by judges, in cases, where this was obligatory or by declaring applications for appointment to be null and void without giving sufficient reasons. (Hungary)

4. Allocation of cases in courts

The established practice that the allocation of cases should be based on objective criteria which the court has approved in advance was put into law on 1.7.2018. In 2019 these rules were brought into force in the courts. (Sweden)

The computer system which randomly allocate cases is managed by the Minister of Justice. There are many complaints from judges but the algorithm of the system is not revealed. (Poland)

5. Independence (including composition and nomination of its members), and powers of the body tasked with safeguarding the independence of the judiciary (e.g. Council for the Judiciary)

The National Court Administration should be reformed. It should be constituted on a similar basis to a Council for the Judiciary. (Sweden)

On 1.1.2019 a law made some changes to the procedure for appointing the president of the Supreme Court. The procedure had been criticized by GRECO and did not accord with the CCJE Opinion on role of the President of Courts in that the President of the Supreme Court is elected by the parliament. These minor changes did not remedy the problem as was clearly expressed in the GRECO 2nd compliance report, published in January 2019. (Croatia)

The Judicial Council Act 2019 established a Judicial Council responsible for promotion of judicial standards and ethics, discipline and conduct, judicial education, and publication of guidelines. (Ireland).

The 15 judge members of the National Council of the Judiciary are elected by the majority of the parliament. (Poland)

The President of the National Office for the Judiciary is subject to the control of the National Council of Justice but in 2018 and 2019 the President of the National Office refused to report to the Council and to participate in the necessary co-operation. She also delayed organising the election of members of the National Council to fill vacant positions and played an unusual role in this election. She was appointed to the Hungarian Constitutional Court in the second half of the year following which the new President started to cooperate with the Council as is laid down in the law. Nevertheless, the GRECO recommendation to change the law by transferring some of the competences of the National Office to the National Council so far remains unimplemented. (Hungary)

A project to transfer administrative cases from the common courts to a separate branch of the court system was withdrawn. It would have given the minister of justice a strong role in this branch of the judiciary. (Hungary)

6. Accountability of judges and prosecutors, including disciplinary regime and ethical rules.

The Ethics and Integrity Commission of the Judicial Council started a pilot project “Ethics Advisor”, where any judge can ask questions about ethics and integrity by e-mail (Slovenia).

A new “Recueil des obligations déontologiques des magistrats” was issued in January 2019, which brought no drastic changes compared with the previous one but is more precise on certain ethical obligations. (France).

The Swedish Association of Judges in 2019 started work on amending the statement of ethical rules. (Sweden)

A new law on the disciplinary accountability of judges was adopted in August 2019. Among other things, it included a detailed description of the disciplinary offences; established a graduation of penalties in accordance with the seriousness of the conduct; introduced the option of requiring a public hearing; and enables the findings of fact to be challenged when appealing to the Supreme Court. (Portugal)

Members of Disciplinary Courts at Courts of Appeal were nominated By Minister of Justice. Members of the Disciplinary Chamber of the Supreme Court were chosen by the National Council of the Judiciary and nominated by the President of the State. The Prosecutors (Disciplinary spokesmen) in the disciplinary proceedings are nominated by the minister of Justice. Disciplinary procedures have been initiated against judges who have sought to uphold the rule of law, including judges who made a reference to the Court of Justice of the EU for a preliminary ruling. (Poland)

Decisions, including decisions on judges, taken in the Bulgarian Councils are dominated by prosecutors, because judges elected by their peers are in a minority. (Bulgaria)

In 2019 the Slovak Constitutional Court ruled that a law which allows information held by the secret service to be used for carrying out security checks on judges was unconstitutional. The new government elected in 2020 proposes to use its parliamentary majority to enact this provision at the level of constitutional law. (Slovakia)

7. Remuneration/bonuses for judges and prosecutors

At the end of July 2019, the Romanian government published draft legislative proposals for reducing substantially the amount of pension payable to retired judges. The proposals were strongly opposed by the Romanian Association of Magistrates and at its request the President of the EAJ wrote to the government, parliament and prime minister expressing the EAJ’s profound concern about these proposals which were contrary to recognised international standards. However, the political moves against judicial pensions continued and on 28 January 2020 legislation was passed removing judicial pensions. The legislation has been challenged before the Constitutional Court but a decision has been delayed because of the Covid 19 pandemic. (Romania)

According to a Constitutional Court decision 10 years ago, the remuneration of judges should be increased. This decision has not been executed by the government. Now, due to the coronavirus crisis, state officials including judges are to suffer a pay cut of 30%. Following a protest of the Supreme Court and the Slovenian Association of Judges the latter may be avoided so far as judges are concerned; but the decision of the Constitutional Court has still not been implemented. (Slovenia)

Draft law to lower remuneration of public servants including judges because of coronavirus crisis (Estonia).

A new law introduced a small additional salary for judges who have to work at weekends, e.g. investigative judges. (Estonia).

Following a judgment of the Constitutional Court of 1.1.2019 the law has been amended and from 1.1.2019 onwards judicial remuneration is linked to indicators which reflect the economic situation (inflation and average remuneration in the country). (Latvia)

The maximum length-of-service allowances for judges were reduced from 35% to 10%. (Latvia).

Better remuneration is needed (France).

Better remuneration for stand-by duties of prosecutors is in process (France).

Suppression of the salary limitation to the salary of the Prime Ministers and introduction of a rule preventing reduction in the remuneration of judges (Portugal).

Members of the Disciplinary Chamber earn 40% more than other judges of the Supreme Court. Prosecutors get extra bonuses, judges not. (Poland)

In spite of the fact that in relation to the gross average income the remuneration of judges in Germany is the lowest of all the member states of the Council of Europe, in 2019 the remuneration of judges and prosecutors was again only increased commensurately with the collective agreements which had previously been negotiated for public employees. (Germany)

8. Independence/autonomy of the prosecution service

No independence. The Minister of Justice is also the Prosecutor General. (Poland)

Following judgment of the CJEU of 27.5.2019, which held that the office of prosecutor does not fulfil the requirements of a judicial authority for the purpose of issuing a European Arrest Warrant, the German Judges' Associations asked for the abolition of the power of ministers of justice to give directions to prosecutors. This power of the ministers has not been abolished but in Germany European Arrest Warrants are now issued only by the courts. (Germany)

9. Independence of the Bar (chamber/association of lawyers)

In 2019 the Legal Services Regulatory Authority (an independent statutory body for solicitors and barristers) began receiving and investigating complaints about solicitors and barristers. (Ireland)

The new Disciplinary Chamber of the Supreme Court now has the jurisdiction for remedies in disciplinary proceedings against advocates and legal advisers.(Poland)

10. Significant developments capable of affecting the perception that the general public has of the independence of the judiciary

Members of the government have unduly criticized activities of the prosecution as politically motivated in cases where politicians were involved. (Austria)

By a Law adopted in July 2019 judges are now obliged to submit a declaration of their incomes, interests and property. (Portugal)

There is enormous lack of public confidence caused by media and politicians who use the work of courts and any court decisions which do not meet expectations to criticize all judges and judiciary at large. (Croatia)

The establishment of a Judicial Council in 2019 has huge potential to affect the public perception of the judiciary. (Ireland)

There is an ongoing slander campaign by government media against judges. The trust in judiciary has significantly decreased. (Poland)

On 15 October 2019, in defending judicial independence, the Romanian Superior Council of Magistracy approved the report of the Judicial Inspection, which strongly criticised many of the practices of the National Anti-Corruption Directorate, including its delays, the use of surveillance of judges and the employment of the security services. The practices had the effect of interfering with the independence of the judiciary.

The Romanian Magistrates' Association is concerned also that many Cooperation and Verification Reports and other reports by the EU Commission and others have proceeded on incorrect information concerning the functioning of the judiciary supplied by the ministry of justice; requests by the Association to have sight of and to comment and correct such information have been ignored. (Romania).

The judiciary are constantly subject to undue criticism from politicians which takes the form of an ongoing coordinated campaign. (Bulgaria)

11. Other - please specify

A proposal for a constitutional reform regarding the appointment of, and the disciplinary regime for, prosecutors in order to increase their independence was debated, but so far no bill has been presented to parliament by the government. (France)

B. Quality of justice

12. Accessibility of courts (e.g. court fees, legal aid)

In March 2019 a law to reform the legal aid system was adopted, which makes applications for legal aid easier. (France)

On the other hand, the new legal aid law was accompanied by an increase in the categories of cases in which representation by a lawyer is mandatory, and by the introduction of mandatory pre-trial mediation for small litigations, both of which reduce direct access to a judge. (France)

Due to a lack of sufficient resources legal aid is provided only to limited categories of persons and in limited types of court proceedings. (Croatia).

Changes in the criminal procedural code allow a trial against an absent person to be commenced and completed even if the absence of the accused is justified. (Poland)

Court fees were raised (some up to 100%) and new court fees were introduced (e.g. if one wants a written statement of reasons for a decision). (Poland).

New provisions in civil procedure increase the formality of proceedings and thus present a handicap for a non-professional claimant. (Poland)

13. Resources of the judiciary (human/financial)

Due to the ongoing austerity politics of recent years, the lack of financial resources and of human resources (judges, prosecutors and especially support staff) for the courts and for prosecution offices have led to a situation which the Minister of Justice himself described as a “danger of a silent death of the justice system.” (Austria)

Drastic cuts in the budget of courts and cancellation of all special projects. (Slovenia)

With the aim of providing more understandable, accessible and faster justice, the budget for the judiciary was increased in 2019 by 4.5 % and in 2020 by 2.8% of the respective previous year. An extra 1500 staff posts, mainly in the penitentiaries, and 100 additional positions for judges have been created. But this is still not enough. (France)

In 2020 the judiciary received less funding than expected, which has led to financial problems in many courts, especially immigration tribunals within the administrative courts. There are fewer law clerks, a fact which will also endanger the recruitment of future judges. (Sweden).

The only change was an increase of the remuneration of the staff, but after 10 years without any increase that is a very small improvement. Many are still leaving the courts for better jobs. (Poland)

There is a lack of judges. In 2019 the number of unfilled vacancies was 725. On average, each judge has 423 uncompleted cases; in 2015 the average was 231. (Poland)

After many years of significant cuts, the last year has seen some increases in human resources in courts and prosecution offices mainly based on the increase in cases relating to asylum seekers or based on security considerations. In January 2019 the Federal Government and the governments of the Länder concluded a “Pact for the Rule of Law”, which foresees that 2000 additional judges and prosecutors and equivalent service support staff would be appointed within one year. (Germany)

By decision 227/2019 the Superior Council of the Magistracy has initiated steps to take over control of the budget for the courts (Romania)

14. Use of assessment tools and standards (e.g. ICT systems for case management, court statistics, monitoring, evaluation, surveys among court users or legal professionals)

The existing system of weighting cases according to the average time which is needed from initiation to the finalisation was modified to take account of recent developments and present circumstances. On this basis the number of judges, prosecutors and Rechtspfleger needed to cope with the workload can be calculated. (Austria)

The digital transformation of justice has been started but has a long way to go. In March 2019 a law was adopted which allows the publication of judgments with the parties anonymised. The French judges' association USM criticizes the failure to extend anonymity to the names of the judges which leaves them open to abuse. (France)

Recording the entire trial proceedings has been introduced in civil cases and in cases of minor crime. These recordings are available to the parties, which helps to build trust of citizens in the courts. (Poland)

15. Other - please specify

In March 2019 a large reform package, which had been widely opposed during the preceding year by the judges' associations and the bars, was adopted. It includes changes in the civil, criminal and administrative procedures and in proceedings concerning juvenile offenders and changes to the jurisdiction of the courts (France)

C. Efficiency of the justice system

16. Length of proceedings

The average length of procedures at appeal courts and high courts has increased by circa one month between 2018 and 2019. (France)

The length of proceedings is shortening year by year (Slovenia)

The length of proceedings is increasing due to the growing number of pending cases and reduction of court staff (up to 8 % of posts are vacant). (Poland)

Comparison of statistics for 2019 with those for 2018 indicates that the average length of proceedings has decreased. (Romania)

17. Enforcement of judgments

The enforcement of judgments is not as it should be, but it is improving. (Slovenia)

An important change introduced is a rule that first instance civil decisions may now be enforced provisionally. (France)

There is a number of very complex criminal and civil cases which have a long duration of proceedings. This jeopardizes the image and authority of the whole judiciary. (Croatia)

18. Other - please specify

In 2019 high courts and district courts were merged in a single judicial tribunal. (France)

Having previously been introduced for the courts of first instance, dematerialization of judicial proceedings (IT) now extends also to the higher courts. (Portugal)

II. Other institutional issues related to checks and balances

A. The process for preparing and enacting laws

18. Stakeholders'/public consultations (particularly consultation of judiciary on judicial reforms), transparency of the legislative process, rules and use of fast-track procedures and emergency procedures (for example, the percentage of decisions adopted through emergency/urgent procedure compared to the total number of adopted decisions).

More and more laws on the status and working conditions of judges and prosecutors, or laws which had to be applied by them, are put out for consultation with the judiciary with too short a time for response or, following a shortened parliamentary procedure (ad hoc initiative of deputies), not at all. Often it appears that comments which had been delivered to the legislature and government were obviously not considered at all. (Austria)

Although the judiciary is involved in the law-making process drafts of bills are usually sent for comments late and with a too short period for comments. Very often (ca. 65%) there is an urgent or a summary procedure in parliament. (Slovenia)

Fast track legislative procedure during crisis. (Estonia)

The legal rule that the General Assembly of the Supreme Court has to be consulted on draft laws is formally followed, but in fact opinion and suggestions are almost never accepted. The same happens even if judges are participating in drafting commissions. (Croatia)

To circumvent the requirement of assessment by other bodies and public consultations, which is obligatory for government draft bills, bills which are in reality government bills are submitted by a group of deputies directly. Even in parliament a lot of irregularities occur to prevent opposition from effective involvement. (Poland)

The judiciary and judges' associations are consulted on proposals to amend laws relating to the administration of justice but the judges' association has found it necessary to stress to government that the procedure for consultation must be real and that it should not expect a blanket response of immediate approval. (Romania)

The previously criticised practice of amending laws on judicial organisation by government emergency ordinance continued in 2019 and 2020. The constitutionality of thus legislating by ordinance is about to be challenged by the People's Advocate. (Romania)

19. Regime for constitutional review of laws.

Of the 15 judges on the Constitutional Court 14 are elected by the current majority of the parliament, among them two former politicians associated with the ruling party. This and the recent jurisprudence of the Constitutional Court raise doubts whether there is an effective constitutional review of laws. (Poland)

B. Independent authorities

20. independence, capacity and powers of national human rights institutions, ombudsman institutions and equality bodies.

The budget of the ombudsman was cut again in 2019, in spite of having more responsibilities. The ombudsman tried to defend judges' representatives for disciplinary matters. He expressed concerns about the treatment of a man suspected of murder and was victim of a hate campaign. (Poland)

Judges have been required by law to declare their membership of any judges' association. Requiring disclosure of this information has no other purpose than identifying judges upon whom pressure can be put. (Bulgaria)

After the Hungarian Judges' Association had protested about the way in which she had influenced the elections of the members of the National Council of Justice, the President of the National Office for the Judiciary ended any support for the association. (Hungary)

C. Accessibility and judicial review of administrative decisions

21. Modalities of publication of administrative decisions and scope of judicial review

The by-law to the Digital Republic bill adopted in the end of 2019 provides for the publication of administrative court decisions within two months. (France)

22. Implementation by the public administration and State institutions of final court decisions

Non-enforcement of court decisions is a problem. Public authorities do not respect rulings of common courts, of administrative courts or the CJEU. (Poland)

Normally court decisions are respected and enforced. On two occasions in 2012 governments of Bavaria and Baden-Württemberg respectively did not enforce judgements of administrative courts. In December 2019 the European Court of Justice approved the possibility that office holders of the State can be taken into coercive detention in order to enforce a judgement. (Germany)