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TRUTHS, HALF-TRUTHS, AND REPORTS OF THE EUROPEAN UNION

position of the Warsaw Enterprise Institute on the European Commission report on the rule of law in Poland

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Summary

The Warsaw Enterprise Institute is of the opinion that the document published by the European Commission on 30 September, entitled 'The Report on the Rule of Law. The chapter on the situation of the rule of law in Poland' does not contain any accusations which could be grounds for introducing any sanctions against Poland, an idea actively backed by a part of the European political class. What is more, by mixing up the rightful and conniving accusations, the document will only worsen the unhealthy climate of debate on key issues for Poland and the EU. Although some of the comments made in the report are pertinent, they still do not touch on the most serious problem for us in the context of the rule of law: the operation of common courts. A realistic diagnosis of the problems of the judicial system should constitute the starting point for any discussion on the rule of law, and the judicial reform is a condition for the proper functioning of the entire system.

1.

How does the EU want to punish its Members, and how can it be done?

Should a fire-fighter judge which of the inhabitants of a house on fire deserves to be saved? **The European Union can take on the role of such moralist fire-fighter if the distribution of the funds for combating the current pandemic is to be made dependent on the respect for the rule of law by its Members.** Such a possibility was actually allowed at the European Council summit in July this year when the EU budget for 2021-2027 was negotiated, and now the four largest clubs of the European Parliament – the European People's Party, the Progressive Alliance of Socialists and Democrats, Renew Europe and the Greens/European Free Alliance – have proposed a specific formula[1]. According to their proposal, the assessment of the condition of the rule of law of a given country would be issued unilaterally by the European Commission on the basis of an annual expert report, and could only be changed by a qualified majority voting in the European Council[2]. In addition, if a given country's access to EU funds is cut off, the creation of a mechanism for direct transfers to the country's citizens has been proposed. This would affect the sovereignty of the Member States, being another step on the road to the EU federalisation.

The proposal from the parliamentary groups appeared shortly after the EC published its report on the rule of law in the Member States. This is the first ever publication of its kind that forms part of the rule of law mechanism that the EU introduced in 2020. **The chapter on Poland is critical and could potentially be – at least from a bureaucratic point of view – a basis for not allocating the EU funds to Poland[3].** However, this is not

1 The proposal has been translated into a European Parliament resolution calling for its adoption. For this to happen, however, the consent of the Council of the European Union is required. Germany wants this not to require unanimity, which will make it possible to ignore the opposition of countries such as Poland and Hungary. https://www.politico.eu/article/european-values-not-for-sale-rule-of-law-eu-budget-and-recovery--plan/? fbclid=IwAR0-sLVElnv8UrNLiJV4HZb1PnCsSaKjKAGYSKAxYJha2o3in_OSRbBosmHI

2 https://ec.europa.eu/info/sites/info/files/rule_of_law_factsheet_toolbox_pl.pdf

3 https://ec.europa.eu/info/sites/info/files/communication_2020_rule_of_law_report_en.pdf

possible under the rule of law mechanism – in light of its provisions, the report is purely of informational and supportive nature in the context of the dialogue between the States and European institutions.

Nevertheless, it should be remembered that the report is a tool for intensifying tension, particularly dangerous in view of **the proceedings under Article 7 of the Treaty on European Union, which are already under way against Poland, and which is an institution separate from the rule of law mechanism.** It provides for the possibility of applying a preventive measure or sanctions against countries which violate the values of the European Union, including the idea of the rule of law. The main actor of the process is the European Commission, which draws up an opinion on the basis of the information obtained from the relevant institutions (i.e. the Venice Commission, the Fundamental Rights Agency, judicial networks) and makes recommendations on such basis. The state to which the recommendations are made must decide to comply with the content of the document, which is a prerequisite for triggering penal procedures. The EC does not have full discretion, and any statement that, 'there is **a clear risk** of a serious breach by a Member State of the values of the Union' is subject to the agreement of four-fifths of the members of the Council and a hearing of the Member State concerned. The decision to impose sanctions, on the other hand, requires the consent of the European Parliament, the unanimous decision of the European Council to recognise an infringement of the rule of law, and the voting on the suspension of such State's **membership rights, including the right to vote**, by a qualified majority. It is at the Council's discretion to revoke this state of affairs.

The Polish State already received the Commission's recommendations on the rule of law on 27 July 2016. The procedure under Article 7 of the Treaty on European Union has also been initiated. Therefore, despite the exclusively consultative nature of this report, it may significantly worsen the atmosphere around Poland. The opinion of a country plunged into a 'crisis of the rule of law' certainly does not serve us. What is worse is that it may serve as the grounds for introducing new sanctions against those Member States which, in practice, are permanently changing the European Union's system. If the new mechanisms, proposed by the European Parliament's groups, are introduced, the document in question would become a tangible tool for punishing Poland and, in the future, for permanent 'supervision' – by the European Commission – over individual states.

The value of the document

We have a case of a document of doubtful merit. The allegations raised in the document are not as serious in scale as one might think from some media reports, and should not be the basis for taking such drastic steps as denying Poland access to EU funds. The report does identify some of the problems with the Polish rule of law quite accurately, but it does not bring anything new to the reports from previous years (the way laws are dealt with, politicisation), and many of the allegations it contains are full of exaggerated speculations (persecution of LGBT movements). Some of the comments contained in the report resemble ordinary journalism, whose authors present opinions on the desired reforms of Polish institutions. In turn, what in the eyes of the authors of the report is an

advantage in our system (the alleged efficiency of the judiciary), is in fact full of various types of flaws.

A half-truth is actually a greater enemy of the truth than a lie. A report full of half-truths will not contribute to a constructive discussion. Below is an analysis of the main theses of the European Commission's report. We would also like to draw attention to the issue of the functioning of the Polish common courts, which has been omitted in the report, and which is no less important, but less interesting from the point of view of Brussels.

2.

Allegations

Allegation No. 1: politicisation of the judiciary

The law should be passed in a considered manner and without haste. This general principle will be agreed by all. The authors of the EC report on the rule of law in Poland rightly note certain dubious practices of Polish legislators in this context. In recent years, reforms of the Polish judiciary have been carried out by means of over 30 acts concerning the entire organisational structure of the judiciary, while the changes have concerned institutions which are of key importance to the functioning of the state, such as the Constitutional Tribunal, the National Council of the Judiciary, the Supreme Court, common courts, administrative courts and the public prosecution service. The authors of the reports objectively point out that, in accordance with the recommendations of the Venice Commission and the OSCE, changes in the law of this format should be preceded by an in-depth debate on legislative proposals and amendments, as well as consultations with stakeholders, experts, and the civil society, and as part of a real dialogue with the opposition. In Poland, these steps have been omitted, taking advantage of the fact that public consultation is compulsory only in the case of legislative proposals submitted by the Council of Ministers, while judicial reforms were initiated by the Sejm [Polish Parliament].

Judges and other officials of the judiciary should not be subject to political influence. That is another general and absolutely right principle of the rule of law. The EC report points out that the changes in the institutions of the Polish judiciary result in its politicisation, and gives as an example the early termination of the active service of around one third of the judges of Supreme Court. Polish politicians have officially motivated the changes in the law that have brought about these changes by their desire to make women's and men's pension rights equal and to lower the age of judges, but, as the authors of the report underline, even if this is a credible reason, it should not be done in violation of the systemically established principle of tenure. Judges appointed for a six-year term should remain in office until the end of their term of office.

The Court of Justice of the European Union ruled in 2019 against the changes in the Supreme Court's system of retirement, but Poland opposed this judgement. However, it is not only Poland that is challenging the judgements of the CJEU. For example, there has

recently been a conflict between the CJEU and the German constitutional court on the basis of the CJEU judgement of 5 May 2020 concerning the European Central Bank's PSPP. In this case, the CJEU ruled on the compatibility of this programme with European law, while the German constitutional court accused it of acting beyond its competence. The case is still pending[4].

Another example of the legal changes highlighted by the authors of the report is the trend towards the transfer of more and more competences to various bodies of the executive, which adversely affects the tripartite separation of power. It is revealed in the changes in the mode of appointing members of the NCJ [National Chamber of the Judiciary] and the Disciplinary Chamber. As a result, the Sejm has been authorised to appoint the majority of judges-members at the expense of representatives of the judiciary. The establishment of a Disciplinary Chamber and a Chamber of Extraordinary Control and Public Affairs in the Supreme Court can also be regarded as elements of the above-mentioned phenomenon. The first one has been given the power to waive the immunity of a judge against whom criminal proceedings have been initiated. Previously, this competence had belonged to the disciplinary courts of first instance. The second one has an exclusive power to decide on matters relating to the independence of courts and the independence of judges. Previously, this competence had been held by the NCJ. The composition of both those newly established chambers is influenced by the ruling party.

The authors of the report do not, however, notice that some aspects of the changes in the NCJ can also be looked at in a positive light. They make us one of the five European countries (alongside Spain, for example) where the composition of the Judicial Council is influenced by citizens through the Parliament. In all the other countries, judges not only nominate the candidates, but also elect them without having to accept the choices democratically made. What is more, as a result of the changes to the NCJ, the previously marginalised district court judges have gained greater representation in the composition of the Chamber itself. The latter has been pointed out by Paweł Dobrowolski, a Polish economist, in his publications[5].

The authors of the report also include the subordination of the Central Anti-Corruption Bureau (CBA) to the Prime Minister and the merger of the office of the Minister of Justice with the function of Prosecutor General as factors adversely affecting the tripartite separation of power. While the first objection seems excessive (the CBA must have some sort of a political superior), the second objection is in its own way apt, as the executive gains some influence over the operation of the judiciary, which may lead to its politicisation. **It should be remembered, however, that this is not an unusual solution.** One of the countries where the position of Prosecutor General is politicised is Germany. He is appointed there by the Minister of Justice with the consent of the *Bundesrat*, and the task of the German Attorney General is to implement the vision of criminal law and national security policy along the lines of the current federal government. However, this does not mean that his position is permanent and that it gives him free rein to obstruc-

4 https://www.osw.waw.pl/en/publikacje/analyses/2020-05-06/germanys-federal-constitutional-court-opposes-ecb-and-court-justice

5 http://dobrowol.org/blog/2020/02/22/dobra-zmiana-w-krs/

ting investigations for political reasons. One of the ministerial prerogatives is to remove the Attorney General from office with immediate effect. This last occurred in 2015 when Harald Range was accused of obstructing the investigation of two journalists. As a result of the scandal, the then Minister of Justice – Heiko Maas – dismissed him[6].

However, do the authors rightly identify the sources of problems with the Polish rule of law, including politicisation? **It seems that the reservations of the European Commission's report regarding the changes in Polish law do not hit the spotlight.** It is true that politicisation is occurring, but it is not a result of the content of the new regulations as such. As we have shown, they may even have positive effects (some changes to the NCJ), and a negative perception of the existence of certain institutions or reforms results from the political context, rather than from their very shape. The authors of the report also fail to see that the Polish justice system has for years been plagued by the institutional and mental legacy of the previous system (socialism), which is co-responsible for the problems in its day-to-day operation; we will deal with that issue further on. Reforming the system is simply a necessity.

The real source and mechanism of politicisation is not the new laws, but the hasty way in which they are adopted, phenomenon we have already mentioned before and which, by introducing chaos, gives room for arbitrary decisions to serve a particular political option. In short, even a good regulation introduced at the right time can have negative political consequences.

Allegation No. 2: politicisation of the media

Public service media are, in principle, supposed to have a mission to offer content that is characterised, as stated in the Broadcasting Act, by 'pluralism, impartiality, balance and independence as well as innovation, high quality and integrity of the message'[7]. The authors of the report state that there occur phenomena in Poland which make it difficult to achieve these objectives. The public service media, like the judiciary, are threatened by politicisation. This apparently would be achieved by way of the establishment, in 2016, of the National Media Council. It has deprived the National Broadcasting Council of its competence to appoint and dismiss members of the management and supervisory boards of Polish Television. As early as in December of the same year, the Constitutional Tribunal found the exclusion of the National Broadcasting Council from the process of appointing bodies managing public service media to be unconstitutional. The judgement has still not been enforced. **The influence of the National Media Council, which is dependent on the ruling party, on public media, is obvious and manifests itself in the unambiguously pro-government profile of the media.** Nevertheless, one may have doubts as to whether the accusation which the European Commission makes of this fact to Poland distinguishes us particularly from other Community countries. They also have public media that are subject to political influence. In addition – returning to Poland – in

6 https://www.dw.com/en/german-justice-minister-maas-terminates-federal-prosecutor-range/a-18625000

7 Article 21(1) - Broadcasting Act of 29 December 1992 (Dz.U. of 2020.0.805).

the past, public service media have already been used for political purposes by various ruling parties. Today, the phenomenon may have intensified, but it is not new for sure.

The Warsaw Enterprise Institute is of the opinion that as long as public service media are financed by taxpayers' money and as long as their mission is carried out by state-owned companies, this is an unavoidable state of affairs, which makes the statutory mission of public service media an unattainable ideal. The role and shape of public service media in the 21st century should be reconsidered.

In the context of the media, the authors of the report point out that since 2019 Poland has fallen, by three places, in the world ranking of press freedom[8]. They point to the following weaknesses in Polish media law:

a. mechanisms for policy-making to influence programme content (National Broadcasting Council),
b. lack of media ownership transparency,
c. lack of full access to public information,
d. the possibility for public authorities to use defamation laws to restrict freedom of expression.

The first accusation is of speculative nature, while the next three are actual problems which should be dealt with. For example, the issue of defamation could be resolved on the basis of civil law, by removing the sanction of a fine and imprisonment. Again, however, these problems are not new, they are not only characteristic of Poland, and have not, so far, had any serious consequences (with a few exceptions).

There is no reason to regard our country as particularly suppressing media freedom – especially as this phenomenon is widespread and often more drastic in the EU. **A good example of this is the Italian public service media.** Four of the five members of the board of directors of the public television station RAI are directly elected by the bicameral Parliament and the Council of Ministers, while the fifth is elected by the employees[9]. One could be tempted to say that almost all the Italian media are concentrated in the hands of political figures. The Mediaset Group is the largest media company in Italy, headed by former Prime Minister Silvio Berlusconi. The politicisation of the media is also a problem in the case of Spain. In 1988, a private television law was passed and private stations entered the Spanish market. Due to the negative opinion and reliance on advertisers, the programme offer of public television has been significantly worsened. This led to its almost full commercialisation and reliance on government subsidies, which negatively affected its credibility. (After all, even government funds did not protect the public broadcaster from indebtedness). In 2010, advertising disappeared from public television, which

8 https://rsf.org/en/poland

9 https://www.loc.gov/law/foreign-news/article/italy-legislation-amending-public-broadcasting-services/

made its existence completely dependent on the mercy of state money. This, in turn, has resulted in attempts to censor[10] materials that were inconvenient for the government.

In an era of mass circulation of information on the Internet, it is not only conventional journalism that is under threat. The German Minister of Justice, Christine Lambrech, said that the hate speech must end where it should – that is, in court[11]. In February 2020, the Bundestag voted on a new regulation which obliges Internet media platforms to report illegal behaviour, such as threats and incitement to hatred towards members of law enforcement forces[12]. The regulations are among the harshest in Europe and give rise to fears that they could become a prelude to authoritarian solutions that could seriously damage freedom of speech in Germany. Lambrech has also announced that, in the future, anyone who incites hatred or threatens others In the Internet will be prosecuted more effectively and rigorously. Bearing in mind the New Year's events in Cologne in 2016, one cannot be sure whether the silence of the public media on a number of sexual assaults was due to fears of violating the rules of political correctness or top-down recommendations for commenting on the events[13].

The UK is also known for its strict regulations on hate speech. In 2016, 3,300 people were arrested and questioned for trolling in social media and online forums[14]. Recently, even private groups in web communicators have become places of surveillance, with police visiting homes of people who have made potentially offensive entries.

In this perspective, one should think about if Art. 212 of the Polish Criminal Code is worse than the hate speech laws in Germany and the United Kingdom. The freedom of speech is restricted by the ban on spreading false or offensive information both in Poland and in those countries. The point is that the issue of slander is easier to take on objectively as opposed to the concept of insult.

Allegation No. 3: lack of personal freedoms

Freedom of speech is a subset of political freedoms. They also comprise personal freedoms, the observance of which in Poland is also a matter of interest for the authors of the EC report on the rule of law. They consider them in the context of allegations of discriminating sexual minorities. Let us also point out that the issue of

10 One employee of RTVE has accused the management of manipulation and censorship. The resulting protest action was appreciated by many journalists who, as part of their protest, would dress in black on Fridays during the presentation of the news. https://civicspacewatch.eu/spain-this-is-how-it-is-manipulated-in-rtve-women-workers-tell-in-the-first-person-the-orders-they-receive-to-misinform/

11 https://www.politico.eu/article/amid-rise-in-extremism-german-hate-speech-crackdown-sparks-censorship-fears/

12 https://www.reuters.com/article/us-germany-facebook-idUSKBN1502CA

13 https://www.politico.eu/article/cologne-puts-germany-lying-media-press-on-defensive-migration-refugees-attacks-sex-assault-nye/

14 https://www.thetimes.co.uk/article/police-arresting-nine-people-a-day-in-fight-against-web-trolls--b8nkpgp2d

persecution of LGBTI communities has been addressed in a marginal and unreliable manner. The authors write about the 'actions of the Polish government against LGBTI groups', 'arrests and detentions of LGBTI representatives', and 'slander campaigns against LGBTI communities', suggesting a mass proportion of the phenomenon. Meanwhile, this whole narrative is based on the case of arrest of one person as a result of an act initially classified as causing damage to health and property[15]. While the charges against the Polish authorities are unfounded in this regard, it is regrettable that the issue of the abuse of the institution of temporary arrest in Poland in the Polish legal system has not been raised in the context of this arrest. It is a serious and unresolved problem.

The issue of the 'LGBT-free zones' was exaggerated by the cleverly prepared provocation of one of the LGBT activists, which used the term and created the impression that Polish municipalities were taking institutional measures to discriminate against persons belonging to sexual minorities[16]. The term 'LGBT-free zone' was created by the Polish weekly Gazeta Polska and wasn't used literally in municipal resolutions. Enactors wrote mostly about "protecting families", in some cases "stopping ideology endorsed by the LGBT circles", and in single cases declared themselves as "self-goverments free from LGBT ideology". In fact, the action concerned the controversy over the content of 'WHO standards' and was merely a declaration.

At the same time, the part of the report concerning personal freedoms is the weakest in the analysed document. It contains unverified information, based on impressions or press reports taken as evidence despite its anecdotal nature. For example, individual critical articles in the press, relating to the treatment of the institution of the Ombudsman by the Polish authorities and related media, were supposed to give the impression that a continuous and negative press campaign was ongoing in Poland in relation to him.

15 https://www.onet.pl/information/onetwarszawa/za-co-areztowano-michala-sz-ps-margot/lsj-52zg,79cfc278

16 https://www.wprost.pl/zycie/10345936/policja-przesluchala-aktywiste-w-sprawie-tabliczek-strefa-wolna-od-lgbt-sprawa-polityczna-do-szpiku-kosci.html

3.

Unjustified praise – a review of the shortcomings of the Polish judiciary

Contrary to the appearances, the report is not just a rod to the Polish legal system. The document contains certain praises for the Polish legal and institutional framework. **In the eyes of the Commission, the issue of preventing corruption and promoting transparency has taken a special place. The work of the Commissioner for Human Rights (RPO) has also been praised.** The report should also not be seen as taking a categorical stance on all the issues raised. Part of its content falls into categories of recommendations and concerns addressed to individual institutions of the Polish state.

It is, however, surprising that when, on the one hand, the significance of the problems, which are serious but not deadly serious, is exaggerated, one fails to see the problems of the Polish system that afflict ordinary Polish citizens. The EU report praises the work of Polish common courts. It reads that 'the overall efficiency of common courts as measured by the length of proceedings is close to the EU average', and even that 'the efficiency of administrative courts is higher than the EU average'. Is this the right diagnosis?

No, it is not. From the point of view of distant Brussels, it may be more difficult to see the real problems of ordinary people in clashing with the state. The real measure of the quality of the judicial system and the rule of law is the level of social acceptance. In this respect, Poland performs very poorly. Only around 30% of Poles positively assess the activity of courts – and this has been the case for many years (according to the CBOS / Public Opinion Research Centre/)[17]. However, as many as 40% of assessments are negative, although it must be admitted that in previous years it was even worse (e.g. in 2015, the ratio of positive to negative opinions was 25 to 52%). For comparison, in the USA, confidence in the courts has not fallen below 50% even once in the last two decades, and

17 https://www.cbos.pl/SPISKOM.POL/2019/K_118_19.PDF

now amounts to about 67%. (data: The Gallup Institute)[18]. The attitude of Poles towards the public prosecutor's office is slightly better – here, positive opinions have fluctuated fairly steadily over the years at the level of about 30%, and the percentage of negative opinions is regularly falling (at the peak it was 46%, today it is only 32%). It is not a controversial statement that, in the opinion of the Poles, it is the courts that constitute the greatest problem of the Polish justice system as a whole.

The devil, as usual, is in the details, as provided by the 2020 'EU Justice Scoreboard', which has been quoted many times in the aforementioned document[19].

Weakness of the judiciary No. 1: protracted proceedings

Every fresh petitioner of Polish courts quickly learns how slow they are. If you look at the data presented in it on the average duration of commercial, civil and administrative proceedings, we are only giving way to seven countries – the average length of proceedings in Poland is less than 100 days. Sounds good? Yes. However, the situation changes radically if we exclude administrative proceedings, leaving only civil and commercial matters in the statistics. The average duration of such cases is around 280 days, and this puts us only in the 15th position in the EU. It is therefore the exceptional efficiency of administrative proceedings of the first instance that makes the overall statistics on efficiency look so good. The question is whether our administrative courts are really that efficient? This makes another statistic – the one measuring the time needed to deal with administrative cases in all instances – questionable. **While the first-instance courts are efficient, the second and third instance courts are not so much – there is an average of over 500 days of proceedings.** This result places us in the bottom five of the European classification. This is difficult to explain, for example, by a lack of staff – the number of judges in Poland (25 per 100 000 inhabitants) is above the EU average, and the total number of court staff is already the absolute European leader (between 80 and 90 per 100 000 inhabitants, depending on estimates). The structure and organisation of the Polish justice system is failing, not the lack of staff[20].

To sum up, as long as a citizen accepts a court judgement, the court is regarded as efficient; things become more complicated when he starts to question the judgements of the courts. This is the answer to the question of why it is so bad, when it is so good; for example, why in terms of 'contract enforcement' we are only ranked 55th in the *Doing Business* ranking (Hungary 25th and Germany 13th, in comparison)[21].

Even if, however, we were to assume that the efficiency of the Polish courts does not differ from the courts in other EU countries (and, as we have shown, it differs), the question

18 https://news.gallup.com/poll/321119/trust-federal-government-competence-remains-low. aspx? fbclid=IwAR1PrjuObQYX3GeDhcEeksZ-TQQCW0iL5KgzQUh-c9Hx1y7p04rJByVhr6c

19 https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1316

20 https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2020_en.pdf?fbclid=IwAR1R7igwrSBydy-zHKkuSdqXnnqJumbgqLu6aTEo6ktwRnGdgkq8NfQh4GJA

21 https://www.doingbusiness.org/en/reports/global-reports/doing-business-2020

arises as to how much we pay for this efficiency. It turns out that, in relation to the GDP, in the EU only the Bulgarians spend more than us on courts. They spend around 0.6% of their GDP – we spend around 0.5% of our GDP. The expenditure of the Germans is around 0.4 percent of their GDP, of the Dutch around 0.3 percent of their GDP, and in the case of the countries such as Lithuania and Latvia – it is around 0.2 percent of their respective GDPs. In other words, as taxpayers, we pay quite a lot for our supposedly effective courts. Hence, it is difficult to be satisfied with this.

Weakness of the judiciary No. 2: lack of openness and transparency.

The second reason for the lack of trust in the courts is the lack of openness and transparency of proceedings and judgments for citizens who are not parties. By using ambiguous rules and formal tricks, access to court files, hearings and grounds of judgements is made difficult, or impossible, by means of imposing secrecy, and sometimes even the judgements themselves are not published. (This is a particularly widespread phenomenon in district courts). When it comes to the publication of judgements, it is difficult to know who rendered those judgements at all. It should be noted that in the United States, every citizen has access to the file of every non-confidential case, and the simplicity and communicativeness of court judgements over many decades has given this profession a real prestige that is unprecedented in continental Europe. Of course, there are cases where the openness of a hearing should be excluded, for example, if it were to endanger the health and life of one of the parties, but these cases are not really frequent in order to make the exclusion of openness and obstruction of access to the file the default option, while, on the other hand, openness and access being merely exceptions.

The current situation has created the conviction in the community that the judicial authority has something to hide, and therefore that it is not fair. This belief is reflected in opinion polls. Less than half of Poles consider our courts to be independent, suspecting them of being at the service of political and business groups. In terms of assessing the independence of the judiciary, the situation is worse in only three other EU Member States.

Weakness of the judiciary No. 3: corporate solidarity

The lack of transparency is followed by **a third reason for the absence of trust in the courts**, i.e. the belief in the doubtful morality of judges. Of course, the vast majority of them are hardworking and honest people. Nevertheless, due to the excessive privileges enjoyed by judges, an unhealthy structure of professional dependence and the culture of infallibility, the phenomenon of 'corporate solidarity' has been created, that is to say, the sweeping under the carpet of the 'bad apples' of the judicial profession.

Excessive privileges include, above all, the immunity which protects judges from liability for trivial offenses such as, for example, speeding. Judges are held accountable by other judges, which leads to turning a blind eye. This creates the feeling that they are 'equal and even more equal' than the rest of the society. As far as **unhealthy professional relationships are concerned**, they are exemplified by the feudal relations between the

serial judge and the president of the court. The latter holds a number of disciplinary and procedural powers, which allow him to decide arbitrarily about the fate of his subordinates or, at least, to make their existence worse (he may, for example, refuse to allow them to render additional paid work outside his principal workplace). The judges, who do not fall out of favour of the president of the court, start competing for his favour instead of concentrating on the efficient resolution of the entrusted cases. They are also panic-stricken by the fear that their judgment could be overturned because, in their perception, that could make it more difficult for them to get promoted and to remain in the profession in general, so they formulate grounds for judgements in such a complicated way so that it becomes rather difficult to assess them in terms of their merits. **The issue of unhealthy culture boils down to the quiet acceptance of the dogma of the infallibility of the judges and an attempt to impose it on the society.** Challenging a judge's judgment is considered to be a faux-pas, which is a legacy of the system prevailing in Poland before 1989, which did not recognise the real subjectivity of the citizen in relations with state institutions.

The judicial system must, above all, serve the citizens, so that their disputes are resolved fairly and efficiently. Failure to meet these two conditions is usually associated with respect for the rule of law. However, is it the lack of respect for the rule of law, as expressed in the politicisation of the judiciary, that is the reason for the disruption of the function of the judiciary's servants, or does the disruption of this function alone make politicisation possible, leading to a lack of respect for the rule of law?

Causality runs in two directions. **A good legal system needs a clear and stable general structure, as defined by the Constitution, but also effective detailed solutions, without which the general principles will erode until no-one else pays attention to them.**

The Warsaw Enterprise Institute will soon publish a report in which it will present concrete reform proposals for the Polish justice system.