



Under Siege Why Polish courts matter for Europe

Piotr Buras, John Dalhuisen, Gerald Knaus, Magdalena Milenkovska

What EU law requires of courts in member states:

“that the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that *it is thus protected against external interventions or pressure liable to impair the independent judgment of its members* and to influence their decisions.”

Judgment of the Court of Justice of the European Union, February 2018

Executive Summary

2018 marked a turning point for the rule of law in Europe. In a landmark verdict in February concerning a salary dispute of judges in Portugal the Court of Justice of the European Union (CJEU) in Luxembourg established a fundamental principle: that courts in member states must be: “protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions.” For this reason, courts in member states need to be “protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions.”

This is no longer guaranteed in Poland today. Polish courts are under siege. A Polish judge given a sensitive case, either a business deal that involves prominent members of the governing party or a criminal case the Minister of Justice (who is also Prosecutor General) has strong views on is not “protected against external interventions or pressure liable to impair her independent judgment.” Polish

ministers of justice, in this or any future government, can threaten, pressure and punish her. New disciplinary procedures make it all too easy.

In countries respectful of the rule of law the disciplinary system for judges is meant to uphold standards and prevent abuse. It does not do so in Poland. No other European democracy has a system like the Polish one. Nowhere else is there such a concentration of powers in the hands of one man. Minister of Justice Zbigniew Ziobro is able to appoint most individuals involved in investigating, prosecuting and judging disciplinary charges against ordinary judges and can intervene in every case.

Recent years have shown that while many of the tools at the disposal of the European Commission are weak the European Union is not defenceless when it comes to defending the rule of law. The experience of the European Commission successfully challenging the Polish law on the Supreme Court in 2018 before the Court of Justice of the European Union has shown this.

Today the European Commission has to take one more crucial step. It should launch another infringement procedure before the Court of Justice, with the aim to restore the independence of courts. These proceedings should focus on the new disciplinary regime for judges.

EU member states should voice their support for this overdue step. All political groups that care about the integrity of the rule of law in the European Union should support it. Now that Commission vice president Frans Timmermans has entered the European parliamentary campaign as a leading candidate it is even more important that the battle to defend the rule of law is strongly backed by Commission president Jean-Claude Juncker. By pushing for another infringement procedure, the outgoing president of the Commission would make clear that this is a matter of European significance. It goes beyond party politics.

By successfully bringing the law on the Supreme Court in 2018 to the Court of Justice of the European Union the European Commission showed that the EU is not helpless when its foundations are undermined. It proved that there is a powerful instrument to protect the rule of law. It restored hope to all European citizens who care about the fundamental values the EU rests upon. Let the successful defense of the rule of law be the lasting historic legacy of the Juncker Commission.

Polish Supreme Court battle – what now?

2018 marked a turning point for the rule of law in Europe. In a landmark verdict in February concerning a salary dispute of judges in Portugal the Court of Justice of the European Union (CJEU) in Luxembourg established a fundamental principle: that, as the ultimate guardian of the rule of law across the EU, it has the obligation to ensure that all citizens of the union enjoy effective judicial protection in their national courts. Its ruling stressed that courts in member states must be: “protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions.”¹

Already at the end of 2017 the Council of Europe’s Venice Commission warned that the numerous changes in the Polish judiciary would lead to a situation that bore “a striking resemblance with the institutions which existed in the Soviet Union and its satellites.” In December 2017 a new law on the Polish Supreme Court was adopted, requiring 40 percent of its judges to retire before the end of their

1 European Court of Justice, “Judgment of the Court”, 27 February 2018.

terms. This included the court's president whose length of tenure is guaranteed by the constitution. The law provided for the forced retirement and new appointment of dozens of judges, so that 70 of 120 Supreme Court judges would be replaced.

On 29 May 2018 ESI and the Batory Foundation published a report with the title "Where the law ends – The collapse of the rule of law in Poland – and what to do." Building on the CJEU ruling in the Portuguese case from February 2018, we called on the European Commission to: "launch an infringement procedure against the Law on the Supreme Court immediately before the Court of Justice, with the aim to stop the mass dismissal of judges which is set to take place in early July, and which would be almost impossible to reverse later."²

Within days this concrete demand was supported by a broad coalition of Polish and European politicians, judges and public figures. On 1 June, former president and Nobel Laureate Lech Wałęsa published a statement calling on the European Commission to act: "That is why I favour asking the Court of Justice of the European Union to evaluate the most questionable changes to the judiciary system... I am also calling on the European Commission to refer the law on the Supreme Court to the EU Court of Justice under Article 258 of the EU Treaty."³

On 5 June the European People's Party, the biggest political group in the European Parliament, issued a statement calling on the European Commission "to use all the instruments, including the Court of Justice of the European Union, to make sure that the Polish government complies with European law and standards."⁴ On 6 June the Polish judges' association Themis declared that it "fully supported the conclusions of the [ESI-Batory] report" and called for "immediate measures." On 13 June three former Polish presidents, four former Polish prime ministers, four former Polish foreign ministers and prominent dissidents in the struggle against the communist regime wrote a letter, calling on the European Commission to act quickly.⁵ They warned that the law on the Supreme Court, in particular: "...will eventually disestablish the tripartite division of powers model, the model that is the essence of the democratic rule of law and the foundation for the identity of the European Union... There will be no democratic Poland without the rule of law. There will be no European Union without principles. There will be no freedom without law and order."

Also on 13 June, the heads of five political groups in the European Parliament – Manfred Weber (EPP), Udo Bullmann (S&D), Guy Verhofstadt (Alde), Ska Keller and Phillipe Lamberts (Greens) and Gabi Zimmer (European left) - published a joint letter urging the European Commission to "immediately start an infringement procedure, in parallel to the Article 7 procedure, and refer the Polish Supreme Court Act to the European Court of Justice (ECJ) to stop the detrimental reform as soon as possible."⁶

This mobilization had an impact. In early June 2018 the European Commission was still uncertain how to confront the Polish government, as everything the Commission had tried until that point to reverse changes in the Polish judiciary had failed. A newspaper article at the time described a power struggle inside the Commission and quoted a senior official saying that "the EU is largely defenceless in

2 European Commission, "Rule of Law: Commission launches infringement procedure to protect the independence of the Polish Supreme", 2 July 2018.

3 "Statement by Lech Wałęsa concerning the Supreme Court: There is no freedom without the rule of law", *Gazeta Wyborcza*, 1 June 2018.

4 EPP, "EPP Political Assembly discusses rule of law in Poland and elects new EPP Vice President", 5 June 2018.

5 "Europe, defend the rule of law in Poland!", *Gazeta Wyborcza*, 13 June 2018.

6 Letter to Jean-Claude Juncker and Frans Timmermans, 13 June 2018.

confrontation with illiberal democracies.⁷ Our own interviews confirmed this. One insider noted that this was “the most intense disagreement yet between Frans Timmermans [the vice president of the Commission in favour of a tough line] and Jean Claude Juncker [the president of the Commission, who questioned whether the Commission would prevail in such a struggle].”

Then, on 2 July 2018, the European Commission opened an infringement procedure against the law on the Supreme Court at the Luxembourg court. It argued forcefully that “these measures undermine the principle of judicial independence, including the irremovability of judges, and thereby Poland fails to fulfil its obligations.”⁸ The Commission referred to Article 47 of the EU Charter on Fundamental Rights: “Everyone is entitled to a fair and public hearing within a reasonable time by an *independent and impartial tribunal* previously established by law.”⁹ It also pointed to Article 19 of the Treaty on European Union and the responsibility of the CJEU to ensure that: “Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.”¹⁰ Taking the Polish Supreme Court law to the CJEU on 2 July was a last throw of the dice, at the very last moment, to prevent the complete restructuring of the Supreme Court. And it worked.

On 19 October the CJEU ordered the Polish authorities to immediately suspend the application of the law on the Supreme Court. Rosario Silva de Lapuerta, the vice-president of the CJEU, warned that without this interim decision to freeze the implementation of the law “the general interest of the Union in the proper working of its legal order could be seriously and irreparably affected.”¹¹ The president of the Polish Supreme Court, Malgorzata Gersdorf, who was supposed to be ousted, returned to the Supreme Court. She told supporters outside the modernist courthouse: “We will see what will happen next, but it is good for now. Life is beautiful.”¹²

On 21 November the Polish government accepted the decision. It amended the law on the Supreme Court without awaiting the final verdict of the CJEU. After three years, this was the first setback in its efforts to restructure the judiciary. It was a powerful illustration that Europe was not defenseless and that European institutions were not impotent. This was a precious success for Frans Timmermans, Jean Claude Juncker and the Commission as a whole. In December 2018 the European Commission declared that it was “satisfied that change is happening and going in the right direction.”¹³

And yet, this was also just one battle in a much larger struggle to prevent the erosion of the rule of law in Poland which is very far from having been won. In December 2017 the European Commission had put a proposal based on Article 7 of the Treaty on European Union “on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law” to the EU Council. It warned that in Poland the constitutionality of laws “can no longer be verified and guaranteed by an independent constitutional tribunal.” It expressed “grave concerns” over the erosion of the independence of the judiciary. Very few of these concerns have been addressed.

7 “Juncker and Selmayr fight Timmermans on behalf of Poland”, Politico, 5 June 2018.

8 European Commission, “Rule of Law: Commission launches infringement procedure to protect the independence of the Polish Supreme”, 2 July 2018.

9 European Parliament, “Chapter of Fundamental Rights of the European Union”, 18 December 2000.

10 “The treaty on European Union”.

11 Court of Justice of the European Union, “Poland must immediately suspend the application of the provisions of national legislation relating to the lowering of the retirement age for Supreme Court judges”, 19 October 2018.

12 “Sędziowie Sądu Najwyższego wracają do pracy. Gersdorf: życie jest piękne”, Polsat News, 22 October 2018.

13 “Polish response to ECJ ruling is in the right direction: EU executive”, Reuters, 18 December.

The danger is now that the Juncker Commission, in its last months in office, may concede defeat on the many other changes that undermine the rule of law in Poland in recent years. This is certainly what the Polish government is hoping for. On 28 January 2019 the Polish Foreign Ministry wrote to the European Commission requesting an end to the Article 7 procedure: “We strongly believe that the procedure based on Article 7 no longer contributes to achieving proper understanding of the content of the reform. Quite the contrary — it started to serve as a tool of exerting political pressure instead of aiming at achieving a constructive and tangible solution”.¹⁴

The Polish government is making an offer to the Commission: cherish your victory in the case of the Supreme Court... and give up on the rest. Timing helps its case: it is only two months before the election of a new European Parliament. Vice-president Timmermans has been chosen to lead the group of European Socialists and Democrats in their campaign. President Juncker is approaching the end of his long political career. Meanwhile the biggest group in the European Parliament, the EPP to which Jean-Claude Juncker belongs, appears to have given up on the defense of the rule of law in Poland. This, at least, is what events on 11 February at the European Parliament suggest.

On that day the Committee on Civil Liberties, Justice and Home Affairs (LIBE) voted on whether to draft a report on the rule of law in Poland. It had expressed its serious concerns for many months. As recently as 20 November 2018 LIBE had held a hearing with representatives of the Council of Europe’s Venice Commission, the European Network of Judicial Councils, the Polish Commissioner for Human Rights, legal experts and representatives of the Polish Free Courts initiative and the Helsinki Foundation for Human Rights. Two weeks later LIBE adopted a report where it warned that “our September delegation to Warsaw proved that the rule of law in Poland is under threat.”¹⁵ There was broad support for the assessment Timmermans presented to LIBE on 20 November: “I regret to inform you that the Polish authorities have not responded to any of the objections of the European Commission. We still have a systemic threat.” Then, in a vote along party lines on 11 February 2019, the LIBE committee decided *not* to draft a report on the rule of law in Poland after all. In this narrow vote Green, Liberal and Socialist MEPs were defeated 26 to 27 by the two Eurosceptic groups (ECR, ENF), joined by 15 members of the European People’s Party (EPP).

Does this reflect the current mood in EU institutions, particularly among EPP members? Will the Juncker Commission concede its ultimate failure in a battle that has been among the most important things it has done during its term?

This must not happen. There is an alternative to inaction and defeat; a way forward that defends the rule of law in Poland and sends a powerful signal to other European governments, now and in the future, tempted to follow the PiS example. It requires the European Commission to act once again. Here is why it should, how it can, and how it would succeed.

Justice without protection – the case of Magda

There are around 10,000 judges at Poland’s courts. Some 7,000 work at 321 district courts [sąd rejonowy], another 2,000 at 45 regional courts [sąd okręgowy] and 700 at 11 courts of appeal [sąd apelacyjny].¹⁶

14 “Rząd do Rady Europejskiej, Komisji i państw UE. Arogancka samoobrona”, OKO.press, 5 February 2019.

15 “European Parliament LIBE committee chief: rule of law is under threat in Poland”, Tvn24, 3 December 2018.

16 There are also administrative courts, supervised by the Supreme Administrative Court, and military courts.

Let us imagine the case of a Polish judge working at the biggest court in the country, one of the two Warsaw regional courts with 260 judges. Let's call her Magda. She is 42 years old, the average age of Polish judges. Magda is experienced, takes her job seriously, sees herself as an apolitical servant of her state and wants to remain in her job until the end of her professional life.

Now imagine that Magda is given a sensitive case: a business deal that involves prominent members of the governing party and is of interest to the government, or a criminal case the Minister of Justice (who is also Prosecutor General) has strong views on. Is Magda "protected against external interventions or pressure liable to impair her independent judgment", as the CJEU put it in its February 2018 Portuguese verdict? Could Polish ministers of justice, in this or any future government, threaten, pressure or punish her? Yes, they could. In fact, new disciplinary procedures make it all too easy.

In Poland judges risk a disciplinary procedure in case of "misconduct, including an obvious and gross violation of legal provisions and impairment of the authority of the office."¹⁷ A hierarchy of public servants is in charge of initiating investigations to establish whether such misconduct has taken place. At the top of this hierarchy are three national disciplinary officials [in Polish: Rzecznik Dyscyplinarny Sędziów Sądów Powszechnych], appointed directly by the minister of justice. In June 2018 the Minister appointed Piotr Schab as the head, and Michał Lasota and Przemysław Radzik as deputies. Schab in turn appointed 56 disciplinary officials among judges, one in each of the 11 courts of appeal and the 45 regional courts.

Following recent changes to the law on courts, the minister appoints and dismisses court presidents. In June 2018 the minister removed the presidents of two district courts and appointed Lasota and Radzik as court presidents instead.¹⁸ The National Judiciary Council can veto a ministerial dismissal only with a two-third majority. This is unlikely, as most of the Council's members were chosen by the PiS parliamentary majority in March 2018, and not as in the past by other judges.

As a judge at the regional court in Warsaw, Magda falls under the responsibility of the disciplinary officer of the Warsaw court of appeals. However, she is just as likely to face an investigation by Schab, Lasota and Radzik. She would then be asked to justify her behavior in writing. She might be interrogated. Media might report on her case. She might even be summoned and questioned about the behavior of other judges, something that has already happened and is illegal, as Adam Bodnar, the country's Human Rights Commissioner, pointed out.¹⁹ In some cases no legal representatives have been allowed to be present at such interrogations.²⁰ If an investigation by a disciplinary officer into Magda's conduct concluded without charges being made, the Minister of Justice might himself insist that it continues anyways. The Minister might even appoint his own special disciplinary official to take over and pursue her case. Theoretically, any disciplinary investigation can last as long as the minister decides, or until it comes to a trial.

Once this happens, Magda's case would be taken up by special disciplinary judges at one of 11 appeals courts. These will have been appointed by the Minister of Justice before, who also decided how many such judges there are at each court of appeal. For instance, at the Warsaw court of appeals the

17 "Law on the Organisation of Ordinary Courts", Art. 107 § 1.

18 Radzik is president of the Regional Court in Krosno Odrzańskie. Lasota is president of the Regional Court in Nowe Miasto Lubawskie.

19 "RPO: Sędzia nie może być przesłuchany jako świadek ws. Dyscyplinarnej", Rzeczpospolita, 25 October 2018.

20 "Postępowanie dyscyplinarne sędziego Tulei: Dubois wyproszony z przesłuchania", Rzeczpospolita, 10 October 2018.

minister appointed 15 disciplinary judges. The president of the new disciplinary chamber at the Polish Supreme Court (recently appointed by the President of the Republic) would choose which of the 11 courts of appeal would decide Magda's case. If she is found guilty of misconduct, penalties range from an admonition to a reduction in her salary to a dismissal.

Of course, Magda would likely appeal any negative ruling. Her appeal would then go to the new disciplinary chamber of the Supreme Court in Warsaw, established in 2018. This chamber has eleven members. Being a member of this chamber is attractive, as they are paid 40 percent more than normal Supreme Court judges. These members were appointed by the president of Poland in September 2018, following suggestions from the National Council of the Judiciary.

We already noted that the president of the disciplinary chamber of the Supreme Court determines in which of Poland's 11 courts of appeal Magda's disciplinary trial would take place. The same person would also select two from among the other ten members of his chamber to decide on her appeal, together with a lay judge appointed by the political majority in the Senate, the upper chamber of the parliament.

Imagine that Magda manages to navigate this system and pursues her career without incurring the displeasure of the Minister of Justice or his officials and that, one day, she is herself appointed a Supreme Court judge. The threat of arbitrary investigations of possible misconduct would continue to hang over her head. In such a case both her first and her second instance disciplinary trial would take place before the disciplinary chamber of the Supreme Court itself: at the first instance level her adjudicating panel would consist of two regular members and one lay judge, at the second instance level of three regular members and two lay judges.

As a result of this system all judges in Poland are aware that they are potential targets of politically-motivated disciplinary investigations. This is new. Before recent changes, disciplinary officers were selected by the National Council of the Judiciary, a majority of whose members were chosen by judges and not by the parliamentary majority. Judges in disciplinary trials were also chosen at random among all judges in the courts of appeal.

In countries respectful of the rule of law the disciplinary system for judges is meant to uphold standards and prevent abuse. Not so in Poland. No other European democracy has a system like the Polish one.²¹ Nowhere else is there such a concentration of powers in the hands of one man. Minister of Justice Zbigniew Ziobro is able to appoint most of the individuals involved in investigating, prosecuting and judging disciplinary charges against ordinary judges and can intervene in every case. Unfortunately, while Magda is a fictional character, Poland's judges today find themselves in the same situation.

Judges under pressure

Every summer since 1995 one of Poland's most famous private charities organizes a free music event near the German border on the river Oder. The Poland Rock festival presents itself as a "massive event firmly rooted in the ideals of peace, friendship, and love": "it might be the last vestige of the world, where people of all creeds and beliefs can co-exist peacefully together. The festival, which attracts

21 Acquaviva Nais, Castagnet Florence and Evangelou Morgane, "A comparative analysis on Disciplinary systems for European judges and prosecutors", 2012.

thousands of guests each year... creates a vibrant, diverse community, where everyone can feel welcome and appreciated.”²² In August 2018 the organizers invited Adam Bodnar, the Polish Commissioner for Human Rights, as well as judges from around the country to talk about the rule of law and how it matters for ordinary citizens.

Then, within the next few months, seven of the participants were summoned by Radzik, the deputy national disciplinary official.²³ In September three were called and asked about the event, their participation and their public criticism of judicial reform.²⁴ In October another two judges were summoned by Radzik to explain their activities at the festival.²⁵ Two more judges later became targets of unrelated investigations, again carried out by Radzik.²⁶

At the end of August, in early September and again in December 2018 the Court of Justice of the European Union (CJEU) in Luxembourg received questions from three Polish judges. These questions concerned the power of the executive over the judiciary, and whether the new disciplinary system in place in Poland undermined judicial independence. The first came from a judge working on a case at her court in Lodz, in which a small town in Central Poland claimed that the governor of the region [the vojevoda of Lodz] had transferred too little funding to the town from 2005 to 2015.²⁷ In an interview in December 2018, she explained what led her to turn to the CJEU: “Aware of the new model of disciplinary control over judges, in which the Minister of Justice influences both the appointment of disciplinary officers and of the panel judging disciplinary cases, I assumed that a judgment against the state in this case [that I am hearing now] could be found to be judicial misconduct. I therefore decided to ask the CJEU whether such a situation does not violate a fundamental European principle: the right to a fair trial.”²⁸

In September, in response to her addressing the European court, Piotr Schab, the national disciplinary officer, started a preliminary investigation, questioning her at the end of the month. He also questioned the two other judges who had turned to the CJEU with similar questions.²⁹

Speeches about the rule of law at rock festivals or questions put to the CJEU were not the only actions that led Poland’s disciplinary officers to become active. A pattern emerged. In September 2018, a judge in Poznan, also the spokesperson of a prominent independent judges’ association, was summoned by Lasota, the deputy national disciplinary officer, to explain why he had publicly declared that the new National Council on the Judiciary had become “fully dependent on the minister of justice.”³⁰ Also in September, another judge in Poznan faced a preliminary investigation after an anonymous

22 Pol’and’Rock Festival, “About the festival”.

23 “Co sędziowie i adwokaci robili na Pol’and’Rock Festival Jurka Owsiaaka. Ujawniamy!”, OKO.press, 5 August 2018.

24 Krystian Markiewicz, Igor Tuleya, Bartłomiej Przymusiński were called into Radzik office on 20–21 September 2018. “Trzech członków ‘Iustitii’ wezwanych do złożenia wyjaśnień. Głośno krytykowali PiS”, TokFm, 10 September 2018.

25 Agnieszka Franckowiak and Arkadiusz Krupa received letters calling for explanation from Przemysław Radzik on 11 October 2018. On 11 January 2018, he decided to close the investigation.

26 Waldemar Zurek from the regional court in Krakow and Ewa Maciejewska from the regional court in Lodz

27 Ewa Maciejewska, a judge at regional court in Lodz received a letter calling for explanation from Michał Lasota on 29 November 2018.

28 “Sędzia Ewa Maciejewska: Mój pierwszy ‘eksces orzecznicy’”, Rzeczpospolita, 23 December 2018.

29 On 29 November, Michał Lasota sent a letter calling for explanation to a at regional court in Warsaw Igor Tuleja, on 31 December to Kamil Jarocki who sits at the regional court in Gorzow Wielkopolski.

30 Bartłomiej Przymusiński, judge at district court in Poznan received a letter calling for explanation from Michał Lasota on 10 September 2018.

complaint alleged that she had stated at a public meeting that “the Polish Constitutional Tribunal is a farce and that the Minister of Justice dismisses court presidents by sending faxes during the night, replacing them with people of doubtful reputation.”³¹ In fact, in December 2017 the European Commission had warned that in Poland “the constitutionality of laws can no longer be verified and guaranteed by an independent constitutional tribunal.”³² The dismissals of court presidents in late 2017 often did involve simply sending a fax.

In November 2018, a judge from the appeals court in Gdansk was summoned by Radzik to explain why at the end of September he had taken part in a public meeting discussing the rule of law at the European Solidarity Center in Gdansk.³³ In December 2018, a judge from Katowice in Southern Poland, who had gone on leave from his court to run for the position of mayor of the town, also faced a preliminary investigation by Radzik.³⁴ Also in December a judge in Gdansk received an award from the mayor of the town for her contribution to the public debate on the rule of law in Poland.³⁵ In March 2019 Michal Lasota, the national deputy disciplinary officer, ordered her to provide a written explanation regarding possible misconduct “due to her failure to uphold the dignity of her office” for accepting the reward.³⁶ In an interview the judge commented on the disciplinary proceedings: “This is meant to silence us. Judges have obligations towards citizens, we have a duty to defend the rule of law and the constitution.”³⁷ In February 2019 Lasota summoned a judge of the regional court in Olsztyn to explain why, on the 100th anniversary of Polish independence, she had posed for a commemorative photo in a T-shirt with the inscription “Konstytucja” (constitution).³⁸

Three preliminary investigations have led to formal investigations being opened. In January 2019, deputy disciplinary official Radzik started formal investigations against two of the judges who attended the Poland Rock festival, Monika Frackowiak and Olimpia Barańska-Małuszek, on account of their alleged failure to meet deadlines for preparing written justifications of their rulings. In February 2019 Radzik opened another formal investigation against a Poznan judge, Slawomir Jeksa, after he acquitted a woman charged with using offensive language at a women’s rights rally.³⁹

What emerges from all this? Judges who speak out on judicial reform, who turn to the European court or who pass verdicts that displease the authorities are being pressured by disciplinary officers, some more than once. To see how this can be combined with other ways of pressure take the case of two of Poland’s most outspoken critics of the judicial reform, the judges Igor Tuleya and Waldemar Zurek.

31 Monika Frackowiak, judge at district court in Poznan was asked by deputy disciplinary officer Antonii Luczak to provide a written explanation. On 4 October 2018, he announced that he did not find any disciplinary offense in her behavior and dismissed the case. See also: “Nie będzie dyscyplinarki wobec poznańskiej sędzi Moniki Frackowiak za publiczne wystąpienia w obronie sądów”, *Gazeta Wyborcza*, 4 October 2018.

32 European Commission, “Recommendation”, 27 July 2018.

33 Włodzimierz Brazewicz, judge at the appeal court in Gdansk received a letter calling for explanation from Piotr Schab on 10 January 2019.

34 Jarosław Gwizdak, judge at district court in Katowice.

35 Dorota Zabłudowska, judge at district court in Gdansk, received a letter calling for explanation from Michal Radzik on 23 January 2019.

36 “Dyscyplinarka grozi sędzi Zabłudowskiej za nagrodę od Adamowicza. ‘Uchybiła godności urzędu’”, OKO. press, 5 March 2019.

37 “Dyscyplinarka grozi sędzi Zabłudowskiej za nagrodę od Adamowicza. ‘Uchybiła godności urzędu’”, OKO. press, 5 March 2019.

38 Dorota Lutostańska, judge at regional court in Olsztyn was asked by Michal Lasota to provide a written explanation in January 2019.

39 Slawomir Jeksa, judge at regional court in Poznan received a letter from Piotr Schab in which he informed that Przemysław Radzik launched a disciplinary proceeding on 12 February 2019.

Igor Tuleya was one of the judges at the Poland Rock festival in August 2018. He was also one of three judges who posed a question to the CJEU. He often speaks in public about the ongoing judicial reform. In 2016 Tuleya played a prominent role in a court case that angered the PiS parliamentary majority. In recent months Tuleya has faced preliminary investigations and questions by disciplinary officers six times already.

Waldemar Zurek is a judge at the regional court in Krakow. He is also a former spokesman of the National Council of the Judiciary. In January 2018 he was dismissed from his function as media spokesman at his court in Krakow by his court president, newly appointed by the minister of justice. The president then transferred him to another department and assigned him a large number of overdue cases. When Zurek challenged this as unreasonable, he faced a preliminary disciplinary investigation.⁴⁰ Three more such investigations followed: one concerning his alleged failure to submit a tax declaration for a tractor he had sold a few years ago, another triggered by his participation in a public event on the reform of judiciary, and a third one initiated by Lasota in January 2019 after Zurek publicly complained about pressure put on his family, his pregnant wife and elderly parents, by prosecutors and the central anti-corruption office investigating the case of his tractor.

Adam Bodnar, the Polish Human Rights Commissioner, has repeatedly warned in recent month that disciplinary investigations are being used to intimidate judges and to stop them from participating in debates on “reforms affecting the judiciary.”⁴¹ While so far many Polish judges have refused to be intimidated, pressure on them is increasing.

Juncker’s European legacy

In May 2018 we wrote in our report on “Where the law ends”: “The Polish case is a test whether it is possible to create a Soviet-style justice system in an EU member-state; a system where the control of courts, prosecutors and judges lies with the executive and a single party. It remains to be seen whether this can be corrected before it inspires others, fatally undermining the idea of the EU as a community based on law and common values.”⁴²

This remains true today. No member state of the EU has ever gone as far in subjugating its courts to executive control as the current Polish government has done. This is a test of the ability of European institutions to defend the foundation on which the European project rests: the ability of citizens and courts across the Union to trust that in every member state effective judicial protection can be provided.

Defending the rule of law in Poland has been one of the defining issues for the Juncker Commission. Since 2015 it has issued numerous opinions and statements on Poland, including four recommendations under its Rule of Law Framework, without extracting significant concessions.⁴³

40 He received a letter calling for explanation from Michal Lasota on 15 October 2018.

41 “Sędziowski rzecznik dyscyplinarny pisze do RPO o przyczynach przesłuchań znanych sędziów”, RPO, 12 October 2018.

42 Piotr Buras, Gerald Knaus, “Where the law ends. The collapse of the rule of law in Poland – and what to do”, ESI and Batory Foundation, 29 May 2018.

43 Commission Rule of Law Framework Recommendations – (EU) 2017 9050, (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520

On the other hand, in July 2017 it opened an infringement procedure related to the introduction of discriminatory retirement ages for male and female judges in the law on the ordinary courts. In July 2018 it decided to use another infringement procedure to address the forced retirement of Supreme Court judges. These legal steps have proven successful, resulting in partial amendments to the offending provisions. The final rulings are still pending.

However, these infringements proceedings address only a thin slice of the governments assault on the judiciary. The Commission should be encouraged, but it cannot be satisfied. It should conclude that while such proceedings offer the most effective tool for protecting the independence of the Polish judiciary it needs to do more, and act as soon as possible.

There is today a wide awareness inside the Commission that the Polish government's assault on its judiciary represents a threat to the EU's legal order and long-term political stability. In fact, when it comes to the intimidation of ordinary judges the situation in Poland is worse than it was a year ago. The time has come for the Commission to take another crucial step and to tackle the unacceptable disciplinary system for judges in Poland.

A recommendation of the Committee of Ministers of the Council of Europe on *"Judges: independence, efficiency and responsibilities"* noted that "disciplinary proceedings may follow where judges fail to carry out their duties in an efficient and proper manner". Indeed, they should follow, as a robust disciplinary system is a guarantor not just of the efficiency of the administration of justice, but also its impartiality. However, it is essential that disciplinary proceedings against judges both respect fair trial guarantees themselves and exclude the possibility of arbitrary or politically motivated interventions on the part of the executive that compromise the independence of judges individually, and of the judiciary as a whole.

The new disciplinary system for judges in Poland provides for the excessive involvement of the executive in ways that undermine the independence of the judiciary and violate the right of judges, subject to disciplinary proceedings, to a fair trial. The effect of this is to jeopardise the rule of law in Poland, the consistent application of EU law in the country and the integrity of the EU legal order as a whole.

Recent years have shown that many of the political tools at the disposal of the Commission are weak. The dialogue initiated under "rule of law framework" relies on a counterpart interested in avoiding escalation. It could not stop the PiS juggernaut. But the experience of the law on the Supreme Court has also shown the European Union is not defenceless. The Court of Justice of the European Union will necessarily need to play a central role again.

This means concretely that:

- The European Commission must launch another infringement procedure before the Court of Justice, with the aim to restore the independence of courts. These proceedings should focus on the new disciplinary regime for judges (focusing on the provisions set out in the legal opinion accompanying this report).⁴⁴
- EU member states should voice their support for this overdue step.
- All political groups that care about the integrity of the rule of law in the European Union should support such action. This goes beyond party politics.

44 The legal opinion can be found on: www.esiweb.org/polandopinion.

Now that Commission vice president Frans Timmermans has entered the European parliamentary campaign as a leading candidate it is even more important that the battle to defend the rule of law is strongly supported by Commission president Jean-Claude Juncker and all other Commissioners. By pushing for another infringement procedure, the outgoing president of the Commission would make clear that this is a matter of European significance. Members of the European People's Party (EPP), as the largest political group in Europe, as well as all other political groups who care about the rule of law in the EU, should support this also inside the Commission.

By successfully bringing the law on the Supreme Court to the CJEU in 2018 the Commission showed that the EU is not helpless when its foundations are undermined. It proved that there is a powerful instrument to protect the rule of law. It restored hope to all European citizens who care about the fundamental values the EU rests upon. It is time to take another step now. Let the successful defense of the rule of law be the lasting historic legacy of the Juncker Commission.

We thank the Europe's Futures project by the Institute for Human Sciences in Vienna and the ERSTE Foundation who supported work on this report. We also thank RAFTO Foundation for invaluable support for our advocacy efforts. This paper also greatly benefited from the expertise of others: Kristof Bender, Sylwia Gregorczyk-Abram, Katharina Knaus, Dariusz Mazur (Association of Judges Themis), Iver Ørstavik, Zuzanna Rudzińska-Bluszcz, Alexandra Stiglmayer, Michał Wawrykiewicz. The responsibility for the paper lies with the authors only.

Stefan Batory Foundation

Sapieżyńska 10a
00-215 Warsaw
tel. (48-22) 536 02 00
fax (48-22) 536 02 20
batory@batory.org.pl
www.batory.org.pl

Publication is licensed under
the Creative Commons
Attribution-ShareAlike 3.0
Poland Unported Licence (cc BY-SA 3.0)



ISBN 978-83-65882-64-6
Warsaw 2019