



Poland's deepening crisis When the rule of law dies in Europe

No member state in the history of the EU has ever gone as far in subjugating its courts to executive control as the current Polish government. The Polish case has become 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.

Too few Europeans are aware of the depth of this crisis. Across Europe, national courts recognise the judgements of courts in other member states, whether these involve commercial law, the European arrest warrant or child custody. Judges must assume that courts across the EU operate according to common values and principles set out in the European Union Treaty and in its Charter of Fundamental Rights. Once judges across the EU have reason to doubt whether courts in any member state provide effective judicial protection, the legal order on which the EU rests collapses.

On 19 November this year, the Court of Justice of the European Union (CJEU) issued a landmark ruling in response to a request from one chamber of the Polish Supreme Court (the Labour Chamber) for guidance on whether another newly created chamber of the Supreme Court (the Disciplinary Chamber), satisfied the requirements of judicial independence under EU law. All members of the Disciplinary Chamber have been appointed recently by a reorganised National Council of the Judiciary. The CJEU set out criteria to judge the independence of any court as determined by the EU treaty. It made clear that recent changes to the National Council of the Judiciary had the potential to undermine its independence. It invited the Labour Chamber to apply these criteria to the question whether the Disciplinary Chamber offered "sufficient guarantees of independence in relation to the legislature and the executive." The CJEU added that there were many factors throwing "doubt on the independence" of the National Council of the Judiciary, involved in the procedure for the appointment of new judges in Poland.

On 5 December, the Labour Chamber applied these criteria. It ruled that the new Disciplinary Chamber failed to satisfy the criteria of judicial independence as set out by the CJEU. Polish minister of justice Zbigniew Ziobro argued in response that “the last word regarding the organization of the judiciary in Poland belongs to the Constitutional Tribunal.” This is an escalation. The Constitutional Tribunal cannot overrule the Supreme Court and does not have the “last word” on whether the Polish judiciary meets the criteria set out in the EU treaties. The CJEU does. It also invited all Polish judges to apply its criteria directly. If the Constitutional Tribunal were to claim that this was illegal it would thereby create a constitutional barrier against further judgments of the CJEU and take Poland outside the EU legal order.

The next escalation followed late on 12 December. PiS tabled a draft law that introduces a range of new disciplinary offences, specifically targeting judges who might apply the recent CJEU ruling. This law might enter into force within a few weeks. Then Polish judges could be dismissed for acting in response to the CJEU ruling and EU law.

In October 2019 the European Commission referred the new disciplinary system for judges in Poland to the European Court of Justice, arguing that this system was incompatible with the EU treaty. Pending the CJEU’s ruling on this the Commission should urgently request an interim decision from the CJEU, suspending the activity of the Disciplinary Chamber of the Supreme Court. The Commission should also request from the CJEU that the infringement case concerning the disciplinary system is accelerated. The on-going intimidation of judges and the Polish government’s response to the CJEU verdict from November 19 provide strong arguments for this.

What is at stake in Poland today is the future of the EU as a project based on core principles such as the rule of law, separation of powers and human rights. The stakes for all Europeans could not be higher.

Grave concerns... and worse

No member state in the history of the EU has ever gone as far in subjugating its courts to executive control as the current Polish government. The Polish case has become 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.

The rule of law is central to the very existence of the European Union. The second article of the Treaty of the European Union states clearly: “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, *the rule of law* and respect for human rights.”

The EU’s Charter of Fundamental Rights promises: “Everyone is entitled to a fair and public hearing within a reasonable time by an *independent and impartial tribunal* previously established by law.”

Already in December 2017 the European Commission warned about the “clear risk of a serious breach by the Republic of Poland of the rule of law.” It noted that 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.

In just four years, the ruling PiS (Law and Justice Party) has changed the whole system of appointment, promotion and disciplining of judges and prosecutors, strengthening executive control of each. It

captured the Constitutional Tribunal, ignoring its rulings until it had a majority of friendly judges on its bench. It dismissed the members chosen by judges on the National Council of the Judiciary, the body responsible for the nomination of judges and safeguarding the independence of the judiciary, and replaced them by members chosen by the parliamentary majority.¹ The Council of Europe's Venice Commission warned already at the end of 2017 that the changes to the judicial system bore "a striking resemblance with the institutions which existed in the Soviet Union and its satellites."²

PiS received a new mandate to govern at recent elections in October 2019, winning a narrow majority in the lower house of parliament (235 of 460 seats) while losing its majority in the upper house (48 of 100 seats). It has no mandate, however, to tear down the constitutional architecture of Poland and to take the country outside the European legal order.

Too few Europeans are aware of the depth of this crisis. It is an existential crisis for the European Union: across Europe, national courts recognise the judgements of courts in other member states, whether these involve commercial disputes, European arrest warrants or child custody. Judges (must) assume that courts across the EU operate according to common values and principles set out in the European Union Treaty and in its Charter of Fundamental Rights. Once judges across the EU have reason to doubt whether courts in any member state provide effective judicial protection, the legal order on which the EU rests collapses. This would cause a crisis far deeper than Brexit. While Poland would not *formally* leave the EU in 2020 it would break up its legal unity from within. This would be an unprecedented development in EU history. Unless there is strong pressure from other member states even the Court of Justice of the European Union (CJEU) in Luxembourg may soon be powerless to have real influence.

When the minister controls the judges

To understand how bad things are today, one must take a close look at how the government in Warsaw already controls judges and courts today, and disciplines judges it does not agree with. The result of this affects the whole EU: a Polish judge given a sensitive case, perhaps a business deal involving members of the governing party or a criminal case the government has strong views about, is not "protected against external interventions or pressure liable to impair her independent judgment", as the CJEU requires of all courts in the EU.

To understand how serious the crisis is one just needs to look at the accumulation of powers in the hands of long-time Minister of Justice Zbigniew Ziobro, since 2015 a lead architect of his governments' "judicial reforms". Ziobro has accumulated legal powers like no other minister of justice in any European democracy has ever had.

Ziobro has the power to appoint every single person involved in the investigation, prosecution and adjudication of disciplinary charges against ordinary judges in Poland. This is an extraordinary degree of influence of the executive over judges. In 2018 Ziobro appointed new national disciplinary officials. These began to initiate disciplinary investigations against judges who have been particularly outspoken in their criticism of the judicial reforms. In 2019 this process accelerated. Since April 2018 Ziobro has also had the power to appoint also a special disciplinary official to investigate any of Poland's almost 10,000 ordinary judges. Even if such an investigation is closed, Ziobro can appoint another

1 See: ESI and Batory Foundation, *Poland and the end of the Rule of Law*, 29 May 2018, p. 3.

2 Venice Commission, *Opinion No. 904/2017*, 11 December 2017.

disciplinary official to examine the same allegations and issue binding instructions how to conduct the investigation. Ziobro also appoints the disciplinary court judges who hear disciplinary cases. His ability to ensure that ideologically aligned judges hear disciplinary cases will not erode over time: while disciplinary judges are appointed for six-year terms he can increase their number at any moment. And he easily can reward them in the future, as he also appoints all court presidents.

In July 2017 Ziobro was given absolute discretion within a period of six months to appoint and dismiss all presidents of ordinary courts (district, regional and appeal courts) in Poland. He used this discretion extensively. He was also given extensive permanent powers to appoint court presidents, as well as to dismiss them on vague grounds of “gross or persistent failure to perform professional duties”; if the continuation of the president in office “cannot be reconciled with the interests of justice.”

The power to appoint and dismiss court presidents is hugely important, as these presidents have a lot of influence on the working lives of the judges under their authority. These powers include assigning judges to divisions and “determining the manner of their participation in the assignment of cases”; dismissing heads of divisions and their deputies; withdrawing, reassigning and adding judges to cases in the interests of “the efficiency of proceedings”; ordering inspections (by “inspecting judges”) of all activities of courts under their authority; “reviewing the efficiency of proceedings in individual cases”; and admonishing the presidents of lower courts for management errors and reducing their salaries.

This is still not all. Since March 2016 Ziobro also controls Poland’s prosecutors, as the PiS majority in parliament once again merged the roles of minister of justice and the prosecutor general into a single post. Ziobro appoints all prosecutors, instructs them, and can intervene in all cases. He can disclose documents related to any investigation to whomever he wishes. Ziobro also purged the prosecutors’ office. Within a few months he dismissed 1,000 of 6,100 prosecutors. He replaced the heads of all 11 provincial prosecutor’s offices and 44 of 45 regional prosecutor’s offices. He dismissed 90 percent of the heads of 342 district prosecutors’ offices. He changed heads of departments at all levels as well as department directors. He dismissed six of seven of his deputies.

Ziobro promotes prosecutors he likes, some twice in a year. Critics are put under heavy pressure. Lex Super Omnia, a Polish association of prosecutors, noted that almost every critical statement by prosecutors results in disciplinary actions. The president of the association faces so many proceedings that, he noted, “it is impossible to keep track of all of them.”

In 2017 PiS remodelled the National Council of the Judiciary, which selects candidates for appointment as judges by the President of the Republic. This allowed it, in the short term, to control appointments to the Supreme Court – including to a newly created Disciplinary Chamber, which hears disciplinary cases against judges, and to a new Extraordinary Appeals Chamber, which adjudicates on electoral issues. Over time PiS’ take-over of the National Judicial Council allows it to reshape the entirety of the judiciary.

Fifteen of the 25 members of the National Council of the Judiciary were previously elected by judges themselves, as is common practice across Europe for such bodies. These fifteen judges are now elected by the majority in the Sejm, the lower chamber of the Polish parliament. The other ten members of the National Council of the Judiciary are: four members *from the Sejm itself (all four members of PiS)*, two members *from the Senate*, one representative of the President of the Republic, the Minister of Justice, the president of the Supreme Court and the president of the Supreme Administrative Court. In total 23 of the 25 positions are directly appointed by political authorities.

On 19 November this year, the CJEU issued a landmark ruling in response to a request from one chamber (the Labour Chamber) of the Polish Supreme Court for guidance on whether another chamber (the newly created Disciplinary Chamber) satisfied the requirements of independence under EU law. The ruling advised: “It is... necessary to ensure that the substantive conditions and detailed procedural rules governing the adoption of appointment decisions are such *that they cannot give rise to reasonable doubts, in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality* with respect to the interests before them.”

The CJEU made clear that recent changes to the National Council of the Judiciary had the potential to undermine the independence of the Polish judiciary. It invited the Labour Chamber: “...to ascertain whether or not the National Judicial Council offers sufficient guarantees of independence in relation to the legislature and the executive, *having regard to all of the relevant points of law and fact relating both to the circumstances in which the members of that body are appointed and the way in which that body actually exercises its role.*”

It added that there were many factors throwing “doubt on the independence” of the National Council of the Judiciary.

The efforts of PiS to control the appointment and careers of judges reflects a long-held and openly espoused vision. It was bluntly explained by Ziobro’s deputy minister, Lukasz Piebiak, in February 2018: “Judges should always be on the side of the state... the conduct of judges is dangerous when the judges turn against the legislative and executive authorities.”

In August 2019, it emerged that Piebiak himself, together with other officials in the Ministry of Justice, organized a smear campaign against critical judges. Piebiak used his access to classified material to collect private information on 20 judges and leaked it to pro-governmental activists who put it on social media. Two members of the National Council of the Judiciary and a judge from the Disciplinary Chamber of the Supreme Court were also involved. Piebiak noted in his emails that he kept his “boss” informed.

An independent portal obtained and published transcripts of conversations between Piebiak and pro-PiS activists about this smear campaign. After a dossier about the private life of the head of Iustitia, a critical association of judges, was sent to some 2,500 journalists, Piebiak wrote in one message that became public: “It is important that people in Iustitia know who they are dealing with. People will spread it, and Markiewicz [*the head of Iustitia*] will quiet down, knowing what we have on him.”

When the activist worried about the legality of the smear campaign Piebiak responded: “We don’t jail people for doing good things.” In another case, material about another critical judge and his girlfriend were to be shared. The activist wrote to Piebiak: “There might be an explosive little piece in *Alarm* [a Polish TV show].” Piebiak responded: “I can only be grateful for such a beautifully executed operation.”³

A barrier against European standards

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 CJEU established a fundamental principle: that, as the

3 Onet.pl, *Śledztwo Onetu. Farma trolli w Ministerstwie Sprawiedliwości, czyli „za czynienie dobra newsadzamy”*, 19 August 2019.

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. The CJEU underlined that 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.”

In its recent ruling on 19 November 2019 the CJEU reaffirmed that independent national courts are essential for the integrity of the EU legal order: “The requirement that courts be independent... forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected...”

The ruling also sets out standards of judicial independence to be used in assessing the legality of the new Disciplinary Chamber in Poland’s Supreme Court. On 5 December 2019, the Labour Chamber of the Polish Supreme Court ruled that the Disciplinary Chamber failed to satisfy these criteria, not least because all its members had been appointed by the new National Council of the Judiciary, whose own composition allowed for, and has been used to ensure, party political influence over judicial appointments.

Minister of justice Ziobro responded by warning that “the last word regarding the organization of the judiciary in Poland belongs to the Constitutional Tribunal.”⁴ The head of the prime minister’s office also declared that the Constitutional Tribunal should adjudicate on the issue.⁵ This is another escalation. The Constitutional Tribunal does not have the “last word” on whether the Polish judiciary meets the criteria of judicial independence set out in the EU treaties. The CJEU does. If the Constitutional Tribunal were to dispute this it would create a constitutional barrier against further judgments of the CJEU, taking Poland outside the EU legal order.

On 12 December PiS parliamentarians raised the stakes further. It tabled a draft law that introduces a range of new disciplinary offences, specifically targeting judges who might apply the recent CJEU ruling on the independence of Polish courts. This law might enter into force within a few weeks. Then judges could be dismissed for applying rulings from the CJEU, unless there is a prior decision by the Constitutional Tribunal allowing this. In this way the PiS-controlled Constitutional Tribunal would become the sole arbiter of the application of EU law in Poland.

Since 2016 the European Commission has struggled to influence the Polish government through dialogue. Its only effective response so far has been to take Poland to the CJEU. Now even this way out of the current crisis is under threat. There can be little doubt that the Constitutional Tribunal is prepared to play the role foreseen by PiS. Julia Przyłębska, the president of the Tribunal, has a close personal relationship with Jarosław Kaczyński, the chairman of PiS, who visits her in her apartment across the street from the Tribunal. Kaczyński explained on TV that “she is a private acquaintance. I really like visiting her.”⁶ Even some judges on the Tribunal appointed by PiS are publicly uncomfortable about this close relationship. On 11 November judge Jarosław Wyrembak accused court president Julia Przyłębska of scheduling hearings in accordance with PiS party interests, manipulating the composition of panels and adjusting dates of hearings to exclude some judges from adjudicating certain

4 TVN24, *Wyrok TSUE w sprawie KRS i Izby Dyscyplinarnej Sadu Najwyższego*, 19 November 2019.

5 Wirtualna Polska, *Michał Dworczyk o wyroku TSUE: Może Trybunał Konstytucyjny będzie musiał goocenić*, 19 November 2019.

6 Wprost, *Jarosław Kaczyński: Julia Przyłębska to moje towarzyskie odkrycie*, 13 May 2019.

cases.⁷ The judge also spoke about pressure to attend secret meetings with PiS politicians, including Prime Minister Morawiecki and Kaczyński.⁸ This is the Tribunal that PiS expects to cut off Poland from the judgements of the CJEU.

On 6 December 2019 President Duda swore in three new judges of this Constitutional Tribunal in an unusual ceremony, to which no media representatives were invited. One of the new judges he appointed was Stanisław Piotrowicz, a former PiS member of parliament and a leading architect of the PiS judicial reform. Piotrowicz is a former prosecutor, who had worked during the period of martial law and prosecuted members of the anti-communist opposition. He had been a member of communist party for 22 years, as well as head of communist party staff training at a Provincial and District Prosecutor's Office near the German border. In 1984 the communist regime awarded him with a Bronze Cross of Merit. This makes clear that it is not the alleged presence of communists among Polish judges that disturbs PiS, but the idea of courts not under the control of the government. In the struggle to bring the independence of courts to an end PiS can expect to rely on Piotrowicz.

How to protect the European legal order

National courts are central pillars in the EU legal architecture. They must defend the norms and enforce EU rules in all member states directly. Once national courts no longer apply EU law due to political pressure the integrity of the EU as an overarching rule-based entity is lost. This would spell the end of the EU as a political project based on the rule of law.

The determination of the Polish government to bring the judiciary under its direct control by any means available is beyond doubt. It also believes that it is on the brink of victory. In a speech delivered on 11 November President Andrzej Duda launched another attack against critical judges of the Supreme Court and then declared: "We will sit them out."

But will European institutions acquiesce in the capture of the Polish judiciary or will they defend the integrity of the EU's legal order? There is really no choice. The EU cannot survive the erosion of its legal foundations.

Earlier this year the European Commission launched an infringement procedure against the disciplinary procedure in Poland. Its press release on 3 April 2019 stated: "The new disciplinary regime undermines the judicial independence of Polish judges by not offering necessary guarantees to protect them from political control, as required by the Court of Justice of the European Union ... Polish law allows to subject ordinary court judges to disciplinary investigations, procedures and ultimately sanctions, on account of the content of their judicial decisions."⁹

However, by the time the CJEU rules on this matter there may not be much of an independent judiciary left to save. Some steps need to be taken urgently.

First, the European Commission should request that the CJEU suspends the activity of the Supreme Court's Disciplinary Chamber. The CJEU could then immediately stop any disciplinary proceedings

⁷ Onet.pl, *Poważne zarzuty wobec Przyłębskiej*, 18 November 2019.

⁸ RMF24, *Trybunał Konstytucyjny – jest gorzej, niż wygląda z zewnątrz*, 5 December 2019.

⁹ European Commission, *Rule of Law: European Commission launches infringement procedure to protect judges in Poland from political control*, 3 April 2019.

against judges, pending its ruling on the disciplinary system in the infringement case before it. The Disciplinary Chamber should cease to issue verdicts and receive cases, while its members should be excluded from the General Assembly of the Supreme Court until a final judgment of the CJEU about their status is issued. This would also reduce the threat hanging over those judges still committed to the preservation of independent courts.

Second, the Commission should request from the CJEU the accelerated procedure in the infringement case concerning the disciplinary system. The on-going intimidation of judges as well as the Polish government's dismissal of the CJEU verdict from November 19 provide strong arguments for this.

Third, member states must warn the Polish government against the grave consequences of undermining the independence of courts. They must focus on the mounting threat of the collapse of rule of law in the EU and the consequences this would have for people (and businesses) in Poland and elsewhere in the EU. They should request information from the Polish government about how it intends to prevent this. The aim must be to restore the conformity of the Polish legal system with European standards.

EU member states should voice their support for these overdue steps. All European political groups that care about the integrity of the rule of law in the European Union should support this as well as a matter of huge significance that goes beyond party politics. What is at stake in Poland today is the future of the EU as a project based on the rule of law, the separation of powers and human rights. More than 350 years ago, the great English philosopher John Locke noted that "wherever the law ends, tyranny begins." Poland is on this threshold now.

Background Reading

On 29 May 2018 the Batory Foundation and ESI published a joint report on the rule of law in Poland. We made a concrete recommendation: that the European Commission take Poland to the Court of Justice of the European Union (CJEU) to challenge its Law on the Supreme Court, which violated core principles of the legal order of the European Union. On 2 July 2018 the European Commission started the procedure which led to Poland being taken to the CJEU in September. The court issued an interim decision to stop implementation of the law. The Polish government withdrew its changes. It was a victory for the rule of law.

On 22 March 2019 the Batory Foundation and ESI published a second report on the rule of law in Poland. We made another concrete recommendation: "the European Commission needs to take Poland to the Court of Justice of the European Union (CJEU) as soon as possible for infringement of the EU's fundamental values and principles, focusing on disciplinary procedures and the executive's control over judges. The case is strong, and the need is great."

For more reading, sources and background:

- Batory-ESI paper: *Under Siege – Why Polish courts matter for Europe* (22 March 2019)
- Batory-ESI legal opinion: *The disciplinary system for judges in Poland – The case for infringement proceedings* (22 March 2019)
- Batory-ESI paper: *European tragedy – the collapse of Poland's Rule of law* (29 May 2018)
- Newsletter (in Polish): *Najbardziej niebezpieczny polityk w Polsce – spuścizna Junkera* (4 April 2019)
- Newsletter: *Poland's most dangerous politician – Juncker's legacy* (27 March 2019)

- Newsletter: *Win-Win for Europe: Defending democracy in the Balkans – and in Poland* (22 June 2018)
- Newsletter: *European tragedy – the collapse of Poland's Rule of law* (29 May 2018)

Read also:

- NEW Parliamentary Assembly of the Council of Europe, *The functioning of democratic institutions in Poland, Report*, December 2019

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