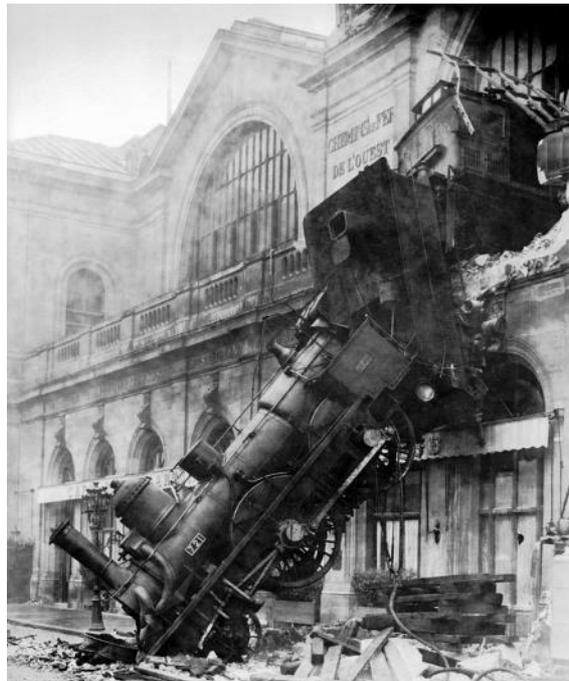


Where the law ends

The collapse of the rule of law in Poland – and what to do

“Everyone is entitled to a fair and public hearing within a reasonable time by an *independent and impartial tribunal* previously established by law.”

(Article 47, EU Charter on Fundamental Rights)



Berlin – Warsaw
29 May 2018

Executive Summary

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. The Polish case is a test whether it is possible to create a Soviet-style justice system, where the control of courts, prosecutors and judges lies with the executive and a single party, in an EU member state.

In December 2017 the Commission proposed to the EU Council to determine that there was “a clear risk of a serious breach by the Republic of Poland of the rule of law.” 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 lack of independent courts. In March 2018 an Irish High Court judge noted a “deliberate, calculated and provocative legislative dismantling by Poland of the independence of the judiciary, a key component of the rule of law.” She argued, in an extradition case involving a Polish suspect, that “the rule of law in Poland has been systematically damaged by the cumulative impact of all the legislative changes that have taken place over the last two years.”

Things are about to get even worse. On 3 April 2018 a new law on the Polish Supreme Court entered into force. The Council of Europe’s Venice Commission warned already at the end of 2017 that the changes bore “a striking resemblance with the institutions which existed in the Soviet Union and its satellites.” The law foresees the dismissal and new appointments of dozens of judges, so that a large majority of judges would be new. This will take place already in July, unless something is done before.

Concrete swift actions by the European Commission, member states and the European Court of Justice can still pre-empt the worst:

- the European Commission vigorously pursues the ongoing infringement procedure against the Law on the Ordinary Courts, which it launched in December 2017 before the Court of Justice of the European Union. The worst signal at this moment would be to withdraw this before it allows the Court of Justice to assess the state of courts in Poland today;
- the European Commission launches 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;
- important EU member states voice their support for both steps. At the same time the Council must ensure that the European Commission’s “reasoned proposal” on the rule of law in Poland, based on Article 7 of the EU’ treaty, is put to the vote as soon as possible, and receives broad backing from member states.

The Polish government’s assault on its judiciary represents a threat to the EU’s legal order and long-term political stability. The EU and national legal orders are now so intertwined as to make up a single patchwork quilt, from which so great a hole cannot be cut, without the whole unravelling. 328 years ago, the great English philosopher John Locke noted that “wherever the law ends, tyranny begins.” Poland is at this threshold now. The stakes could not be higher. The outcome of this conflict will determine whether the EU has a future as a community based on the rule of law.

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Cast of characters



Party chairman (PiS)
Jaroslaw Kaczynski



President
Andrzej Duda



Minister of Justice
Zbigniew Ziobro



Commission Vice-president
Frans Timmermans



Irish High Court judge
Aileen Donnelly



President European Court
Koen Lenaerts

The battlefield over the rule of law



Poland's Constitutional Tribunal: 15 judges



Poland's Supreme Court: currently 81 judges

Main authors: Piotr Buras and Gerald Knaus

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The 20 percent revolution

Three years ago, in May 2015, Andrzej Duda, a young lawyer, former member of parliament and former undersecretary of justice, running as the candidate of the Law and Justice Party (PiS), won the Polish presidency with 51.5 percent of the vote. A few months later, in the parliamentary elections of October 2015, some twenty percent of Polish voters cast their ballot for the Law and Justice Party led by Jaroslaw Kaczynski. As half of the electorate did not vote, PiS won 37.6 percent of all votes cast. This translated into a narrow parliamentary majority of 5 seats. By the end of the year PiS controlled the presidency, the parliament and the first single-party government since the end of communism.

PiS had a mandate to govern. Instead, the party proceeded to tear down the constitutional architecture of Poland. This has led to an unprecedented confrontation with the European Commission, the guardian of the EU treaties. In December 2017 the Commission proposed to the EU Council to determine that there was “a clear risk of a serious breach by the Republic of Poland of the rule of law.” 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 lack of independent courts. After two years of fruitless dialogue with Warsaw, the Commission now turned to the member states for support.¹

In March 2018, meanwhile, an Irish High Court judge, Aileen Donnelly, noted a “deliberate, calculated and provocative legislative dismantling by Poland of the independence of the judiciary, a key component of the rule of law.”² She argued, in an extradition case involving a Polish suspect, that “the rule of law in Poland has been systematically damaged by the cumulative impact of all the legislative changes that have taken place over the last two years.”³ This Irish case is now before the Court of Justice of the European Union (CJEU) in Luxembourg.

On 3 April 2018, a new law on the Polish Supreme Court entered into force. The Council of Europe’s Venice Commission had warned at the end of 2017 that the changes bore “a striking resemblance with the institutions which existed in the Soviet Union and its satellites.”⁴ The law foresees a drastic change in the highest court in the country, including the dismissal and new appointments of dozens of judges, so that a large majority of judges would be newly appointed. This change would be the culmination of a frenzied process where “within the period of two years, more than thirteen consecutive laws had been adopted, affecting the entire structure of the judicial system in Poland: The Constitutional Tribunal, the Supreme Court, the Ordinary Courts, the National Council for the Judiciary, the Prosecution Office and the National School of the Judiciary.”⁵

This is a moment of truth for the European Union. As the Court of Justice of the European Union (CJEU), member states and the European Commission weigh their actions every

¹ European Commission, Reasoned Proposal under Article 7(1) for a Council Decision regarding rule of law in Poland, 20.12.2017, p. 21,

http://ec.europa.eu/newsroom/just/document.cfm?action=display&doc_id=49108.

² Ruaidhrí Giblin, High Court judge seeks EU ruling on effect of Polish law changes, The Irish Times, 12.3.2018, <https://www.irishtimes.com/news/crime-and-law/courts/high-court/high-court-judge-seeks-eu-ruling-on-effect-of-polish-law-changes-1.3424530>.

³ Judgement of the Irish High Court, Minister of Justice vs. Artur Celmer, 12.3.2018, <http://www.statewatch.org/news/2018/mar/ireland-Minister-v-Celmer-final.pdf>.

⁴ Venice Commission, Opinion No. 904/2017, 11.12.2017,

[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2017\)031-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)031-e).

⁵ Judgement of the Irish High Court, Minister of Justice vs. Artur Celmer, 12.3.2018, *ibidem*.

decision now involves risks. The Court of Justice of the European Union will rule whether it agrees with the Irish High Court judge. Member states in the EU council will have to decide with a majority of at least 22 of 28 member-states whether they back the European Commission's warning. And the European Commission faces the immediate choice whether to take Poland to court over its terrifying Law on the Supreme Court, trying to block it before it leads to the dismissals and appointments of a large number of judges in July.

This paper makes two main arguments. First, no one should underestimate the seriousness of the current crisis over the rule of law in Poland or its implications for the EU as a whole. 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 includes Hungary under prime minister Viktor Orbán, to which Poland is often compared.⁶ 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.

Second, the PiS government has pursued a shrewd and consistent strategy in the face of criticism by European institutions: to stall, to obfuscate and to avoid any meaningful concession. Poland's parliamentary majority has repeatedly expressed its strong determination to destroy any possibility for independent courts to control its actions; while simultaneously denying that there is any difference between the democracy it envisages and what exists elsewhere in the EU. The key protagonists – party leader Kaczyński, president Duda, minister of justice Ziobro – are all lawyers, the first two with a doctorate, who know what they are doing. The hope entertained in some EU capitals that current talks between the Commission and the Polish government might lead to a compromise preserving meaningful independence of courts is strongly contradicted by the experience of the past three years. This Polish government has made clear that it will not accept any outcome that curtails its control over courts, from the Supreme Court to the smallest of Poland's 321 district courts. PiS is about to achieve what it has long believed to be its legitimate objective: unchecked executive power.

The most important question now is what kind of strategy is most likely to defend the rule of law, not only in Poland but across the EU, not only now but for the foreseeable future. The Court of Justice of the European Union will necessarily need to play a central role, but the Court will be able to do this successfully only if there is also more engagement from both the Commission and from most member states. This means concretely that:

- the European Commission must vigorously pursue the ongoing infringement procedure concerning the Law on Ordinary Courts, which it launched in December 2017 before the Court of Justice of the European Union. The worst signal at this moment would be to withdraw this due to cosmetic changes on the part of the government in Warsaw, before the Court of Justice is able to assess the state of courts in Poland today;
- The European Commission must launch an infringement procedure concerning 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.

⁶ Zoltán Fleck, Judges under attack in Hungary, *Verfassungsblog*, 14.5.2018, <https://verfassungsblog.de/judges-under-attack-in-hungary/>.

- EU member states should voice their support for both steps. At the same time the Council must ensure that the European Commission's "reasoned proposal" on the rule of law in Poland, based on Article 7 of the EU Treaty, is put to the vote as soon as possible, and receives broad backing from member states.

The Polish government's assault on its judiciary represents a threat to the EU's legal order and long-term political stability. The EU and national legal orders are now so intertwined, both nationally and transnationally, as to make up a single patchwork quilt, from which so great a hole cannot be cut, without the whole unravelling.

328 years ago, the great English philosopher John Locke noted that "wherever the law ends, tyranny begins." Poland is at this threshold now. The stakes could not be higher: does the EU have a future as a community based on the rule of law?

Shock, awe and the courts

Outside observers struggle to grasp the depth of change in Poland. They are, of course, mostly aware of controversies involving courts and judges in Warsaw. There are articles in international media; human rights organisations present reports; scholars discuss what to call the emerging Polish system ("illiberal democracy"? "plebiscitary autocracy"? "authoritarianism by stealth"?). However, at a time of war in Ukraine, trade tensions with the US, worries about Iran, Brexit talks with the UK and concerns about the Irish border it is tempting to hope that Poland will sort itself out eventually. A recent article in the Economist referred to "PiS-style democracy" as a system which is "majoritarian" and about "rulers' freedom of action." It noted that PiS has "*neutered* the Constitutional Tribunal." It noted that the prospect of PiS remaining in power for much longer "sends liberals *scrambling for a stiff drink*. It is a *headache for the EU*."⁷ The article concluded that a worst-case outcome was still improbable:

"In the worst case, Poland may have started down the authoritarian road already travelled by Turkey and Hungary. Today few see this as likely."

Any problem that can be overcome by "a stiff drink" does not seem too serious. In fact, most outside observers are unaware how much has already changed in Poland. This is in part due to the speed with which PiS proceeded. It took the new Polish government and president only one year to assert full control over the Constitutional Tribunal. It took another 1.5 years to assert control over much of the rest of the judiciary. To abolish independent courts and the rule of law in an EU member state is not well described as a "headache." More appropriate medical analogies would be a serious stroke or cancer.

For most Europeans the idea that democracy in Poland may be at risk still seems alarmist. Polish democracy was long hailed as a model success story of Europe's peaceful post-1990 transformation. Poland joined the Council of Europe in 1991, NATO in 1999, the EU in 2004 and became a member of Schengen in 2007. In 2002 a leading expert on democratisation considered Poland (and Hungary) the leaders among former communist countries "en route to

⁷ Poland's ruling Law and Justice party is doing lasting damage, Economist, 21.4.2018, <https://www.economist.com/europe/2018/04/21/polands-ruling-law-and-justice-party-is-doing-lasting-damage>.

becoming successful, well-functioning democracies.”⁸ Before its most recent elections in October 2015 the Polish economy outperformed those of every other European country – in fact, Poland was the only EU member state that did not go into recession during the recent global economic crisis.

In May 2015 PiS’s presidential candidate Andrzej Duda obtained 34.8 percent in the first and 51.5 percent in the second round. In October PiS won an absolute majority of seats in the lower (Sejm) and upper (Senate) houses of parliament: 235 of 460 seats in the Sejm, 63 of 100 seats in the Senate. Again, though, few alarm bells rang. Having a president and prime minister from PiS was not unprecedented. One decade earlier, the party had won both parliamentary and presidential elections in 2005. For one year, Lech Kaczynski as president and Jaroslaw Kaczynski as prime minister ruled Poland as twins. Then, in 2007, PiS lost an early parliamentary election. In 2010 the crash of his official airplane killed president Lech Kaczynski in Russia. In the following elections PiS lost the presidency.

Back in opposition the message of PiS resembled that of other populist movements: defending the nation against outside interference and “Brussels”, protecting traditional values, rejecting Muslim immigration and refugees, promising a lower retirement age and increased support to families. During the recent election campaigns party leader Jaroslaw Kaczynski, aware that he was a polarising figure, stayed in the background. With one notable exception: in early October 2015 a few days before the parliamentary elections he delivered an aggressive speech on migrants, warning that these “have already brought diseases like cholera and dysentery to Europe, as well as all sorts of parasites and protozoa.”⁹ Kaczynski predicted that Poland might be forced to resettle more than 100,000 Muslims unless the government changed. A badly-thought through EU policy idea – which foresaw relocating a few thousand asylum seekers to Poland, an almost irrelevant number given the crisis at that time – helped PiS win an absolute majority.¹⁰

The determination and speed with which PiS set about dismantling judicial independence, however, took everyone by surprise. The first target was the Constitutional Tribunal, which had been in the crosshair of PiS for a long time, identified once by Jaroslaw Kaczynski as “the bastion of everything that is bad.”¹¹ Although the PiS majority in parliament was in a position to immediately replace two Constitutional Tribunal judges, whose mandates ended in late 2015, it would have taken PiS until almost the end of its mandate in late 2019 to replace a majority of judges. The party was not willing to wait that long.

On 2 December 2015 a PiS majority in the lower house of the Polish parliament nominated not two but five new judges to the 15-member Constitutional Tribunal, challenging three judges already elected by the previous parliament shortly before the end of its term. All five were immediately sworn in by president Duda. The Constitutional Tribunal ruled unanimously that this procedure was unconstitutional. What followed was a legal coup in which the government check-mated the tribunal’s majority in three moves. First, president Duda had already refused to swear in the three judges lawfully appointed earlier. Second,

⁸ Thomas Carothers, The End of the Transition Paradigm, Journal of Democracy, 2002, <https://www.journalofdemocracy.org/sites/default/files/Carothers-13-1.pdf>.

⁹ Jan Cienski, Migrants carry “parasites and protozoa,” warns Polish opposition leader, Politico, 14.10.2015, <https://www.politico.eu/article/migrants-asylum-poland-kaczynski-election/>.

¹⁰ More on why relocation was an unworkable idea at the time: ESI Newsletter, Getting results? How muddled thinking prolongs the refugee crisis, 14.12.2015, https://www.esiweb.org/index.php?lang=en&id=67&newsletter_ID=101.

¹¹ Jan Cienski, Poland’s constitutional crisis goes international, Politico, 24.12.2015, <https://www.politico.eu/article/poland-constitution-crisis-kaczynski-duda/>.

parliament passed a law on internal procedures within the Constitutional Tribunal which prescribed that the court could take decisions only with a quorum of 13 of 15 judges. It then claimed that as the Tribunal refused to accept the three judges illegally appointed by PiS, it did not meet the quorum and could no longer act at all. Finally, the government refused to publish judgements by the Tribunal in the Official Journal. The Constitutional Tribunal was turned from a guarantor of the constitutionality of laws into a hapless by-stander within a few weeks. Its president complained. He did not allow the illegally appointed judges to work. The Supreme Court backed the Constitutional Tribunal. The government did not budge.

In 2016 prosecutors opened a case (upon the request of the Helsinki Foundation for Human Rights) concerning the refusal of the prime minister to publish verdicts of the Constitutional Tribunal. Prosecutors responsible for this case were changed two times. Finally the minister of justice achieved the desired result and the case was discontinued.¹² In a decision published on 10 February 2017 a prosecutor argued that the Prime Minister – though obliged by the constitution to publish all verdicts of the constitutional tribunal – may have had justified concerns that the publication of those rulings would be illegal.¹³ A former president of the Constitutional Tribunal, Marek Safjan, noted that this was the point at which the rule of law in Poland ended.¹⁴

The fact that PiS wanted to silence the Tribunal was no surprise. Party leader Jarosław Kaczyński had long railed against “impossibilism”, the notion that courts had legitimate reasons to limit what governments could do. In June 2016 Kaczyński repeated that “the conflict with the Constitutional Tribunal is to a large extent a conflict over whether democratic mechanisms and elections are decisive in shaping public life or whether ... power remains in the hand of professional corporations or lobbies”.¹⁵ The Polish minister of Foreign Affairs compared the president of the Constitutional Tribunal to an “Ayatollah in Iran.”¹⁶ In September 2016 the minister of justice warned that unless something was done the Constitutional Tribunal would “block any changes that would cure the Polish judiciary”.¹⁷

In December 2016, PiS struck the final blow. The term of the president of the Tribunal came to an end. According to the Polish constitution an assembly of all judges, chaired by the Tribunal’s incumbent vice president, was to make a proposal for a successor. Instead the PiS majority in parliament adopted a law, creating a position not foreseen in the constitution: an “acting president of the Tribunal.” It gave president Andrzej Duda the right to appoint this “acting president.” Duda appointed Julia Przyłębska, one of the judges elected by PiS in late 2015. She moved fast, bringing on board the three judges rejected by the previous court president and the majority of judges, called a general assembly of judges on 20 December 2016, and – when a majority of judges objected – chaired a session where only six (PiS appointed) judges elected her the permanent Tribunal president. Duda immediately swore in

¹² Paweł Szaniawski, Kłątwa śledztwa w sprawie wyroku Trybunału? Zrezygnował kolejny prokurator, Newsweek Polska, 24.4.2016, <http://www.newsweek.pl/polska/remigiusz-krynke-rezygnuje-ze-sprawy-publikacji-wyroku-tk,artykuly,384327,1.html>.

¹³ Niepublikowanie wyroków TK: dokumenty z śledztwa, Helsińska Fundacja Praw Człowieka, 30.11.2017, <http://www.hfhr.pl/niepublikowanie-wyrokow-tk-dokumenty-z-sledztwa/>.

¹⁴ Quoted in Wojciech Sadurski, How Democracy Dies (in Poland): A case study of Anti-constitutional populist backsliding. p. 30.

¹⁵ Ibidem.

¹⁶ Adam Gaafar, Waszczykowski: Rzepliński jest jak ajatollah z Iranu, podobnie jak cały Trybunał Konstytucyjny, Natemat.pl, 10.3.2016, <http://natemat.pl/173935.waszczykowski-rzeplinski-jest-jak-ajatollah-z-iranu-podobnie-jak-caly-trybunal-konstytucyjny>.

¹⁷ Mateusz Wojtalik, PiS chce przejąć sądy. Ziobro przyznaje: Jest jeden problem, Newsweek Polska, 10.9.2016, <http://www.newsweek.pl/polska/zbigniew-ziobro-o-reformie-sadow-problemem-trybunal-konstytucyjny,artykuly,396878,1.html>.

Julia Przyłębska.¹⁸ She, in turn, quickly forced the former vice president of the Tribunal to take a holiday which lasted until his regular retirement later that year. She also changed the composition of panels of judges, ensuring that PiS appointed judges had the majority in panels judging controversial cases. When justice minister Zbigniew Ziobro claimed, without evidence, in early 2017 that three other judges had been unconstitutionally elected in 2010 and should therefore not participate in court proceedings, she obliged.

By early 2017 the Tribunal was firmly under PiS's control. By June 2017 nine of the 15 members of the Tribunal had been appointed by PiS, including its president and vice president. In early 2018, a pro-government Polish magazine declared Julia Przyłębska person of the year, arguing that she symbolised the "rebuilding of the justice system in Poland." At the award ceremony she was warmly congratulated and given flowers by PiS leader Jaroslaw Kaczynski.

Having silenced the Constitutional Tribunal, the government announced its next ambitious plans: to target how judges and prosecutors were trained; how ordinary courts operated; how judges were promoted, disciplined and dismissed. The focus shifted to the National School of Judges and Prosecutors (NSJP), the National Council of the Judiciary (NCJ), to ordinary courts and finally to the Supreme Court. No stone in the structure of the judiciary would remain unturned.

Dismantling judicial independence: four key laws

Law	In force since
on the National School of Judges and Prosecutors	June 2017
on Ordinary Courts	August 2017
on the National Council on the Judiciary	March 2018
on the Supreme Court	April 2018

Developments are now coming to a head. In April 2018 a new Law on the Supreme Court entered into force. 40 percent of Supreme Court judges, including the court's president, will be forced to retire after 3 July 2018, before the end of their legal terms. This is a dramatic blow to judicial independence. Only those judges of whom the Polish President approves may stay on at his mercy. At the same time many more new judges are to be chosen by a National Council of the Judiciary to staff two new super chambers inside the Supreme Court. In one swoop most Supreme Court judges (some 70 out of 120) will be newly appointed. The two new chambers will transform the court profoundly: one will be responsible for disciplinary actions against judges; the other will be able to set aside final court judgements reached in the past two decades as well as decide upon election disputes. Both will be filled completely with new judges appointed by the National Council of the Judiciary, most of whose members PiS replaced early in 2018 with its supporters.

The European Commission watched these developments with growing alarm. It stated in a first Rule of Law recommendation in July 2016 that "there was a systemic threat to the rule of

¹⁸ Maciej Pach, Powołanie, którego nie było, *Konstytucyjny.pl*, 10.2.2017, <http://konstytucyjny.pl/powolanie-ktorego-nie-bylo-maciej-pach/>; Ewa Siedlecka, Prezes Przyłębska nielegalna? Złamała przepisy, które uchwalił PiS, *Gazeta Wyborcza*, 5.1.2017, <http://wyborcza.pl/7,75398,21204828,prezes-przylebska-nielegalna-zlamala-przepisy-ktore-uchwalil.html>.

law in Poland.”¹⁹ It repeated this in December 2016.²⁰ A third Rule of Law recommendation in July 2017 warned that “the situation of a systemic threat to the rule of law has seriously deteriorated.”²¹ Indeed it has, and has continued to do so since.

PiS continues to argue that the reforms it promotes are both necessary and legitimate, taking on a dysfunctional judiciary that is inefficient and slow. As the minister for justice argued in February 2017: “In Poland we have the second highest number of judges in Europe per 100,000 inhabitants. We are on the top. We are also on the top when it comes to the inefficiency, duration and expiration of cases.”²² One problem with such claims is that existing comparisons, such as the EU’s Justice Scoreboard, show a different picture. In 2017 the Polish judiciary was the 12th most efficient system in Europe (among 28).²³ None of the reforms curtailing the independence of courts are designed to address concerns over inefficiency.

And then there is a second argument, which is not about efficiency but about the past. PiS argues that too many of Poland’s judges started their work when Poland was a communist country, representing a totalitarian mindset. In April 2017 minister Ziobro called for a radical break with the “mentality and pathology of the communist elites” in the judiciary.²⁴ A government White Paper published in early 2018 argued that the “Polish judiciary has never accounted for its communist past. Only some of the most compromised judges of the Supreme Court were expelled in 1990 – the majority in common courts remained unaffected.”²⁵

In fact, in 1990 81 percent of judges of the Supreme Court were dismissed; all those remaining were individually reviewed. Among the 82 judges in the Supreme Court in 2017 there were only 6 judges who had already worked at lower instance courts during the martial law era (1981-1983); and with no individual proof of immoral behavior.²⁶ The average age of Polish judges in 2017 was 44.²⁷ Ironically, one of the leading authors of the recent changes is

¹⁹ European Commission, Rule of Law: Commission issues recommendation to Poland, 27.7.2016, http://europa.eu/rapid/press-release_IP-16-2643_en.htm.

²⁰ European Commission, Rule of Law: Commission discusses latest developments and issues complementary Recommendation to Poland, 21.12.2016, http://europa.eu/rapid/press-release_IP-16-4476_en.htm.

²¹ European Commission, European Commission acts to preserve the rule of law in Poland, 26.7.2016, http://europa.eu/rapid/press-release_IP-17-2161_en.htm.

²² Interview with Minister of Justice Zbigniew Ziobro (in Polish), 20.2.2017, <https://vod.tvp.pl/video/kwadrans-polityczny,20022017,28862463>.

²³ 200 days are needed on average to resolve judicial disputes in Poland (compared to 100 days in Luxembourg, 150 days in the Czech Republic, 320 days in France and 510 days in Italy). This put Poland in 12th position among 28 EU member states. The same is true for the number of the pending cases: with 4 pending cases per 100 inhabitants Poland is EU average. Source: European Commission, The 2017 EU Justice Scoreboard, pp. 8-10, https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2017_en.pdf.

²⁴ TOP 7 cytatów z wywiadu Ziobry dla “wSieci”: “Nie kryję, że planujemy bardzo poważne zmiany, jeśli chodzi o kształt Sądu Najwyższego”, Wpolticyce.pl, 18.4.2017, <https://wpolticyce.pl/polityka/336019-top-7-cytatow-z-wywiadu-ziobry-dla-wsieci-nie-kryje-ze-planujemy-bardzo-powazne-zmiany-jesli-chodzi-o-ksztalt-sadu-najwyzszego>.

²⁵ Chancellery of the Prime Minister, White Paper on the reforms of the Polish justice system, 8.3.2018, p. 1, https://www.premier.gov.pl/files/files/white_paper_en_-_executive_summary.pdf.

²⁶ Iustitia Polish Judges Association, Response of the Polish Judges Association Iustitia to the White Paper on the Reform of the Polish Judiciary presented to the European Commission by the Government of the Republic of Poland, 13.3.2018, https://www.iustitia.pl/images/pliki/response_to_the_white_paper.pdf.

²⁷ Leonid Bershidsky, Poland pitches Europe on its war on judges, Bloomberg, 26.2.2018, <https://www.bloomberg.com/view/articles/2018-02-26/poland-s-war-on-judges-faces-european-backlash>.

PiS parliamentarian Stanisław Piotrowicz, who had himself been a communist prosecutor preparing indictments against dissidents during the martial law period.²⁸ Now he argued that Polish “judges do not follow the will of the people but defend their own interests.”²⁹ Other statements by PiS leaders are reminiscent of communist justice, as when deputy minister of justice Lukasz Piebiak warned 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. A body of 10,000 judges will always have black sheep, whereas our task is for there to be as few as possible, and to *mercilessly eliminate those that are found.*”³⁰

Life as a Polish judge – the story of Adam

Imagine a young lawyer – let us call him Adam – interested in becoming a judge in Poland today. Adam graduates from a Polish university this year. He applies to be admitted to the National School for Judiciary and Public Prosecution in Krakow.³¹

This school was established in 2009. At this moment it teaches 156 aspiring judges and prosecutors.³² It is completely controlled by the Ministry of Justice. The minister appoints all members of the board supervising the content of education. He can veto appointments of lecturers.³³ He appoints 7 of 9 members of the examination committee. He also chooses the school’s director. The current director, appointed in 2016, had been undersecretary of state in the Ministry of Justice under Ziobro one decade ago.

The education of judges in the National School takes 36 months. Graduates are then appointed by the minister of justice as junior judges for up to four years, a position reintroduced by PiS in 2017. They can become junior judges in any of Poland’s 321 district courts, deciding cases.³⁴ In case Adam gains the minister’s confidence he can be granted the right to work as a full judge before the end of his probation period.

While the position of junior judges had existed in the past it was abolished in 2007 by the Polish Constitutional Tribunal, which argued at the time that junior judges were too

²⁸ Kulisy kariery prokuratora Piotrowicza. “Jak można tak ludziom kłamać?”, TVN24, 15.11.2017, <https://www.tvn24.pl/wiadomosci-z-kraju,3/czarno-na-bialym-kariera-stanislaw-piotrowicza,790243.html>.

²⁹ Piotrowicz o sędziach: Nie kierują się wolą narodu, tylko bronią własnych interesów, Dziennik. Gazeta Prawna 16.05.2017, <http://wiadomosci.dziennik.pl/wydarzenia/artykuly/549884/piotrowicz-o-sedziach-nie-kieruja-sie-wola-narodu-tylko-bronia-wlasnych-intereso.html>.

³⁰ Interview with Deputy Minister of Justice Lukasz Piebiak (in Polish), 13.2.2018, <http://wpolsce.pl/magazyn/2495-prosze-to-wyjasnic-edyta-holdynska-rozmawiala-z-lukaszem-piebiakiem-wiceministrem-sprawiedliwosci>.

³¹ In Polish: KSSIP, <https://www.kSSIP.gov.pl/>.

³² Ruszyły aplikacje na sędziów i prokuratorów 2018, Rzeczpospolita, 5.3.2018, <http://www.rp.pl/Aplikacjeegzaminy/303059952-Ruszyly-aplikacje-na-sedziow-i-prokuratorow-2018.html>.

³³ Stanisław Skarżyński, Ustawa o Krajowej Szkole Sądownictwa to pięćset etatów sędziowskich dla ludzi Ziobry, OKO.press, 13.3.2017, <https://oko.press/ustawa-o-krajowej-szkole-sadownictwa-piecset-etatow-sedziowskich-dla-ludzi-ziobry/>.

³⁴ In Poland there are 321 district courts (sądy rejonowe), 41 regional courts (sądy okręgowe) and 11 appellation courts (sądy apelacyjne). See https://pl.m.wikipedia.org/wiki/Struktura_s%C4%85d%C3%B3w_powszechnych_w_Polsce.

dependent on the Minister of Justice, who not only appointed but could also dismiss them.³⁵ The European Court of Human Rights agreed in 2011, finding that the system of junior judges violated the right to a fair trial.³⁶

After his years as a junior judge Adam can apply to become a full judge. Unless the minister of justice or the president of the respective court object the National Judiciary Council can recommend Adam to the President of Poland. The ultimate decision is up to the president.

In January 2018 there were 408 vacancies in Polish courts, positions which have not been filled during the last two years.³⁷ In the past barristers and law professors would have competed with Adam for positions as judges. Following the new law on the National School from June 2017 graduates of the School are preferred as future judges as soon as they pass the final exam.

Once Adam becomes a full judge his future career continues to depend on the Minister of Justice in many ways. A new law on courts, which entered into force in August 2017, allowed the minister to dismiss 194 of 730 court presidents and their deputies during a period of six months without giving any justification.³⁸ Even now the Minister retains the right to replace court presidents unless blocked by a two-third majority in the National Council of the Judiciary (NCJ). This gives the minister huge influence over all court presidents, who in turn have a lot of influence over other judges. Adam's court president can move him from one section of the court to another without consulting him, decides about holidays, the assignment of assistants, and the workload. The Law on Courts introduced a "new disciplinary hierarchy" among court presidents, with the Minister of Justice on top of a pyramid, grading regular reports by court presidents and increasing and decreasing their allowances as a result ... a "blatant interference with judicial independence."³⁹

Another key role is played by the National Council for the Judiciary, which influences Adam's appointment, assessment, promotion and disciplinary proceedings. The nature of the National Council changed dramatically when a new law entered into force in March 2018. Before then 15 of its 25 members were judges chosen by other judges. Of the other ten, one was the representative of the President, one the Minister of Justice, six parliamentary deputies as well as the presidents of the Supreme Court and the Supreme Administrative Court ex officio.

In March 2018 the terms of all 15 serving judges-members were prematurely terminated, to be replaced by 15 judges-members chosen by the parliamentary majority. In the end only 18 judges were even put forward for the NCJ as candidates. All opposition parties but one boycotted the election of these new NCJ members in parliament. 267 deputies voted for nine

³⁵ Wyrok z 24 października 2007 r., Sprawowanie władzy sędziowskiej przez asesorów, Trybunał Konstytucyjny, http://trybunal.gov.pl/fileadmin/content/omowienia/SK_7_06_PL.pdf.

³⁶ Helsińska Fundacja Praw Człowieka, Ważne orzeczenia ETPCz w polskich sprawach, 15.6.2011, <http://www.hfhr.pl/wazne-orzeczenia-etpcz-w-polskich-sprawach-3/>.

³⁷ Małgorzata Kryszkiewicz, Konkursy odblokowane. Coraz więcej wakatów w sądach rejonowych, Gazeta Prawna, 28.2.2018, <http://prawo.gazetaprawna.pl/artykuly/1107588,wakaty-w-sadach-rejonowych.html>. According to other sources there were even 800 vacancies in spring 2018.

³⁸ Rozmiary czystek w sądach (listę nazwisk) ujawniają sędziowie, Monitor Konstytucyjny, 17.5.2018, <http://monitorkonstytucyjny.eu/archiwa/3982>.

³⁹ Wojciech Sadurski, How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding, p 43

judges-candidates nominated by PiS and for six by the group of the party Kukiz'15.⁴⁰ In this way a political majority – with 21 of 25 members in the NCJ chosen by the legislature – will determine the future careers of all Polish judges.⁴¹

During his career Adam will need to avoid falling foul of the Minister of Justice for another reason. The new law on courts grants the Minister of Justice extensive competences in disciplinary proceedings.⁴² He can appoint a special disciplinary prosecutor to whom the minister gives personal instructions.⁴³ All members of a disciplinary first instance court are also nominated by him. The law allows the use of evidence obtained without judicial control and even in violation of laws, including telephone tapping. Ombudsman Adam Bodnar noted that the extensive disciplinary powers of the minister might have “a chilling effect on judges”.⁴⁴

A recent case in North Eastern Poland highlights the dangers of such a concentration of powers. On 4 March 2016 a group of citizens staged a political protest during an exhibition opening used by PiS as an electoral campaign event before a Senate election two days later.⁴⁵ They were prosecuted for “disturbing the public order.” In January 2017 a judge at the responsible first instance district court, Dominik Czeszkiewicz, found the protestors not guilty. The case went to the second instance court. It later became public that the responsible judge met the deputy minister of justice in secret before he overturned the *not guilty* verdict, ordering a re-examination of the case.⁴⁶ Another first-instance judge found the protesters *not guilty* a second time. The second-instance judge, however, was promoted by the minister of justice to be the next president of the regional court. He immediately opened a disciplinary case against Czeszkiewicz on an unrelated matter, accusing him of having conducted another interrogation with undue delay.⁴⁷

In January 2018 deputy Minister of Interior Jarosław Zieliński, who was among the politicians at the museum opening, explained in a radio interview that judge Czeszkiewicz had “encouraged the breaking of the law” by issuing the verdict finding the protestors not guilty.⁴⁸ An assembly of judges in Krakow warned in February 2018 that initiating these

⁴⁰ Kandydaci do KRS z poparciem PiS i Kukiz'15 – lista, Rzeczpospolita, 2.3.2018, <http://www.rp.pl/Sedziowie-i-sady/303029950-Kandydaci-do-KRS-z-poparciem-PiS-i-Kukiz15---lista.html>. Kukiz'15 is an opposition party which often supports government's legislative initiatives.

⁴¹ 12 of 15 new judges in the National Council of the Judiciary had been recently appointed by the current Minister of Justice to administrative positions in their courts (during the 6 months period when he had the right to exchange presidents of courts without any justification) or were judges seconded to the Ministry of Justice. Source: Patryk Wachowiec, Minister Ziobro – nowa KRS. Mapa powiązań, FOR, 20.2.2018, <https://for.org.pl/pl/a/5775.nowa-krs-zalezna-od-ministra-sprawiedliwosci-mapa-powiazan>.

⁴² The Minister of Justice can file a binding objection to a decision by a disciplinary proceedings representative not to initiate disciplinary proceedings. Art. 114 paragraph 9 of the Law on the System of Ordinary Courts.

⁴³ Małgorzata Kryszkiewicz, Zbigniew Ziobro, sędzia wszystkich sędziów. Postępowania dyscyplinarne w rękach polityków, Gazeta Prawna, 27.3.2018, <http://prawo.gazetaprawna.pl/artykuly/1112119.nowa-ustawa-o-sn-postepowanie-dyscyplinarne-wobec-sedziow.html>.

⁴⁴ Adam Bodnar, Europe can save Poland from darkness, Politico, 9.4.2018, <https://www.politico.eu/article/poland-judiciary-rule-of-law-europe-must-intervene/>.

⁴⁵ “To nie miejsce na wiec!” Awantura na otwarciu wystawy o gen. Andersie, 4.3.2016, <https://www.tvn24.pl/wiadomosci-z-kraju,3/krzyki-na-otwarciu-wystawy-o-gen-andersie.624650.html>.

⁴⁶ Mariusz Jałoszewski, Sędzia, który uniewinnił działaczy KOD, ma zarzuty dyscyplinarne. Bo rzekomo źle sądzi, OKO.press, 20.4.2018, <https://oko.press/sedzia-ktory-uniewinnil-dzialaczy-kod-ma-zarzuty-dyscyplinarne-bo-rzekomo-zle-sadzi/>.

⁴⁷ Mariusz Jałoszewski, Sędzia, który uniewinnił działaczy KOD, ma zarzuty dyscyplinarne. Bo rzekomo źle sądzi, OKO.press, 20.4.2018, <https://oko.press/sedzia-ktory-uniewinnil-dzialaczy-kod-ma-zarzuty-dyscyplinarne-bo-rzekomo-zle-sadzi/>.

⁴⁸ Interview with Jarosław Zieliński (in Polish), 2.1.2018, <https://radio5.com.pl/pierwszy-gosc-w-2018/>.

disciplinary proceedings was “retaliation for an earlier judgement rendered by judge Dominik Czeszkiewicz.”⁴⁹ In April 2018 Czeszkiewicz was charged by the disciplinary prosecutor with misconduct. The case is still open. If found guilty Czeszkiewicz might be removed from the bench.

In the past a judge like Czeszkiewicz would have faced disciplinary charges before an independent disciplinary court whose members would have been appointed by the National Council of the Judiciary. According to the new law on the Supreme Court (in force since 3 April 2018), if found guilty a judge will have to appeal to the Supreme Court. There, from July 2018, all disciplinary cases will be decided by a newly established disciplinary chamber whose judges are appointed by the new National Council of the Judiciary. There will also be lay judges, members of the public who do not need any legal training, chosen by the Senate, the upper chamber of parliament, where PiS has an absolute majority. This disciplinary chamber will be an entirely new body, independent from the rest of the Supreme Court, with its own president and budget and entirely composed of new judges. The new law on the Supreme Court includes no less than 580 references to disciplinary measures. And it is not only judges, such as Adam, who must fear this new disciplinary system. Other judicial professionals, such as barristers, may face disciplinary procedures before this new chamber as well.

Let us assume that Adam manages to navigate this system – he passes his exams at the National School, gets appointed junior judge, is promoted and assessed positively, gets on with the court presidents chosen and avoids disciplinary procedures. He thus reaches the retirement age of 65. He will then again be dependent on the new National Council of the Judiciary which decides whether he may keep working for a few more years “if this is justified by the interest of the judiciary system or other important interests of society.”⁵⁰ If Adam should ever become a Supreme Court judge this decision would be taken by the Polish president.

In short: the minister of justice has power over his education, over his appointment as a junior judge, over his court presidents who manage his work; the minister can punish him and has a lot of influence in disciplinary cases. The Minister is a member of the NCJ and a parliamentarian of the governing majority, which chooses the majority of NCJ members. He is also, since the law changed in February 2016, both Minister of Justice and General Prosecutor in charge of all prosecutions. In 2016, at a time when the Constitutional Tribunal was checkmated, the ability of the Minister/General Prosecutor to interfere in and direct specific prosecutions was strengthened. It is hardly surprising that the Venice Commission found this unprecedented concentration of powers troubling:

“Taken together, the merger of the office of the Minister of Justice and that of the Public Prosecutor General, the increased powers of the Public Prosecutor General vis-à-vis the prosecution system, the increased powers of the Minister of Justice in respect of the judiciary (Act on the organisation of Common Courts) and the weak position of checks to these powers (National Council of Public Prosecutors) result in the accumulation of too many powers for one person.”⁵¹

⁴⁹ Resolution of the Assembly of Representatives of Judges of the Regional Court in Kraków of 26 February 2018, 10.3.2018, <http://konstytucyjny.pl/resolution-of-the-assembly-of-representatives-of-judges-of-the-regional-court-in-krakow-of-26-february-2018/>. An assembly of judges at the appeals court in Kraków shared the same opinion in its resolution No 4 of 16 April 2018.

⁵⁰ Article 69 of the Law on the ordinary courts from 12.4.2017.

⁵¹ Venice Commission, Opinion No. 892 / 2017, 11.12.2017, Paragraph 115, [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2017\)028-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)028-e).

It is easy to imagine how in the polarised world of Polish politics, where the opposition is regularly accused of committing national treason and where critics are often described as enemies, such powers might be used. After all, Zbigniew Ziobro, the current minister and general prosecutor, was minister of justice before (2005-2007). In 2007 the Economist noted Ziobro's "fondness for announcing investigations and arrests at press conferences, and his enthusiasm for setting his prosecutors on to political opponents," warning then that Ziobro had "little regard for the separation of powers or for due process."⁵² That year, following the arrest of a doctor accused of corruption, Ziobro declared at a press conference before any trial had even started that "nobody will be killed by this guy anymore." In 2017, after a court exonerated the accused a prosecutor immediately initiated an investigation against the person providing legal expertise in the case.⁵³

Watchdogs without teeth

PiS managed to turn the Polish system of justice upside down without a constitutional majority in parliament. It did so despite strong domestic opposition. How was this possible?

The Constitutional Tribunal objected for a year and was ignored, until its composition was changed. The Supreme Court objected for more than two years and was ignored too; it will soon see most of its judges newly appointed. The National Council of the Judiciary objected until most of its members were dismissed and replaced. The Polish Ombudsperson keeps raising concerns. He has already been threatened by the PiS majority and by the (unlawfully) appointed new vice-president of the Constitutional Tribunal.⁵⁴ Concerns have also been raised by associations of judges, associations of lawyers, bar associations, the opposition in parliament and many civil society organisations. In the end none of these were able to stop the legal bulldozer of PiS. In the face of determination and ruthlessness domestic checks collapsed like a house of cards. Criticism was presented as treason in media supporting the government. The opposition in parliament was presented as unpatriotic. Critical NGOs were attacked.⁵⁵

Domestic opposition failed to have an impact until now. The same is true for international watchdogs and organisations. Poland signed the Paris Declaration on a new Europe in 1990, joined the Council of Europe in 1991 and became member of the EU in 2004. All these institutions have rules requiring respect for fundamental rights and the rule of law. All have been toothless until now. This raises a troubling question: what *is* the benefit of European conventions, treaties and courts when they cannot defend the independence of courts in the face of such a blatant attack?

There has been no shortage of analyses. In January 2017 the European Network of Councils for the Judiciary (ENCJ) found that recent changes were in violation of basic values:

⁵² Bad habits, 27.9.2007, Economist, <https://www.economist.com/node/9867255/print>.

⁵³ Mariusz Jałoszewski, Sąd oczyścił doktora G. Prokuratura Ziobry nie odpuszcza: ściga biegłego, który wystąpił w tej sprawie, OKO.press, 1.6.2016, <https://oko.press/sad-oczyscil-doktora-g-prokuratura-ziobry-odpuszcza-sciga-bieglego-ktory-wystapil-tej-sprawie/>.

⁵⁴ "Sprzeniewierza się ślubowaniu". Muszyński podpowiada, jak odwołać Rzecznika Praw Obywatelskich, 5.5.2018, <https://www.tvn24.pl/wiadomosci-z-kraju,3/rzecznik-praw-obywatelskich-trybunal-konstytucyjny-i-ustawa-antyterrorystyczna,834607.html>.

⁵⁵ Jędrzej Bielecki, Szymański: Środowiska prawnicze blokują porozumienie z Brukselą, Rzeczpospolita, 7.5.2018, <http://www.rp.pl/Polityka/305079922-Szymanski-Srodowiska-prawnicze-blokuja-porozumienie-z-Bruksela.html>.

“The ENCJ standards are not met in several fields. These standards are not developed to serve the interests of the judiciary. The standards simply reflect the shared principles and values of the EU Member States which guarantee a proper functioning of a democratic systems based on the Rule of Law.”⁵⁶

In April 2017 the Consultative Council of European Judges (CCJE) concluded that “the pre-term removal of the judges currently sitting as members of the National Council of the Judiciary is not in accordance with European standards on judicial independence.”⁵⁷

In May 2017 the OSCE’s Office for Democratic Institutions and Human Rights (ODIHR) issued a strong opinion warning that the independence of the judiciary was jeopardised by changes “threatening the independence of the Judicial Council, and as a consequence, judicial independence overall as guaranteed by Article 173 of the Constitution.”⁵⁸ In July 2017 the Council of Bars and Law Societies of Europe (CCBE) addressed a letter to president Andrzej Duda urging him to veto the laws then already adopted:

“Violating or threatening the autonomy and independence of courts is not only an internal problem of Poland. It has consequences for international legal community as well and affects directly the application of European Union law.”⁵⁹

Duda did veto two of the three laws. It soon became clear that this above all to buy time: the Polish parliament later adopted these same laws again following only cosmetic changes and Duda signed them. In October 2017 UN Special Rapporteur for the Independence of Judges and Lawyers Diego Garcia-Sayan issued a scathing opinion following a mission to Poland.⁶⁰ In December 2017 he concluded bitterly that Poland experienced “a vicious attempt to place the whole judicial system under the control of the executive and legislative branches.”⁶¹

Meanwhile, in November 2017, the European Parliament adopted a resolution: it “believes that the current situation in Poland represents a clear risk of a serious breach of the values referred to in Article 2 of the TEU.”⁶² Finally, in December 2017 the Venice Commission issued another opinion which found that changes “puts at serious risk” the independence of all parts of the Polish judiciary. It referred to similarities with the former Soviet system of justice no less than five times:

⁵⁶ ENCJ’s opinions on the draft laws in Poland, European Network of Councils for the Judiciary, 30.1.2017, <https://www.encj.eu/articles/96>.

⁵⁷ Opinion of the CCJE Bureau following the request of the Polish National Council of the Judiciary, 7.4.2017, <http://krs.gov.pl/admin/files/rp2013/opinia%20ocje%20en%201%20april%202017.pdf>.

⁵⁸ Final opinion on draft amendments to the act on the National Council of the Judiciary and certain other acts of Poland, OSCE, 5.5.2017, <https://www.osce.org/odihr/315946?download=true>.

⁵⁹ CCBEInfo, #64, July-August 2017, http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/Newsletter/CCBEINFO64/EN_newsletter_64.pdf.

⁶⁰ Preliminary observations on the official visit to Poland (23-27 October 2017), OHCHR., 27.10.2017, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22313&LangID=E>.

⁶¹ Poland reforms are part of plan that severely undermines independence of judiciary, says UN Special Rapporteur, OHCHR, 22.12.2017, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22564&LangID=E>.

⁶² Resolution of 15 November 2017 on the situation of the rule of law and democracy in Poland, European Parliament, 15.11.2017, <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P8-TA-2017-0442>.

“The proposed Polish system is not entirely identical to the old Soviet system but has a lot of similarities with it ... in one respect the proposed system is even worse than its Soviet predecessor.”⁶³

⁶³ Venice Commission, Opinion No. 904 / 2017, 11.12.2017,
[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2017\)031-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)031-e).

The Polish cat and the European mouse

All these criticisms went unanswered and had no impact on policy. So far, the same is true for the warnings from the European Commission.

Recent years made obvious that the tools at the disposal of the Commission are weak, almost inviting any government determined to violate principles to play cat and mouse with the Commission: a “rule of law dialogue”, established in order to “prevent escalation of systemic threats to the rule of law”, relies on a counterpart interested in avoiding escalation. It is a slow mechanism: first assessments and an opinion are to be published, then recommendations, then a follow-up to these. None of this could stop the PiS juggernaut.

The Polish government made clear to the Commission how little it took it seriously. In the first recommendation in July 2016 the Commission invited the government to solve the problems identified **within three months**. In its reply three months later the Polish government “disagreed on all points ... and did not announce any new measures.”⁶⁴ In the second recommendation in December 2016 the Commission invited the government to solve the identified problems as a matter of urgency **within two months**. In its reply two months later the Polish government “disagreed with the assessments set out in the recommendation and did not announce any new action to address the concerns.” In the third recommendation in July 2017 the Commission invited the government to solve the problems identified **within one month**. In its reply one month later the Polish government “disagreed with all the assessments set out in the recommendation and did not announce any new action to address the concerns.”

Timmerman's struggle

In 13 January 2016 the European Commission launches a procedure for the protection of the rule of law towards Poland (dialogue).

On 1 June 2016 the Commission adopts a negative opinion on the rule of law in Poland.

On 27 July 2016 the Commission issues the first recommendation on the rule of law in Poland. It issues a warning that “there was a systematic threat to the rule of law in Poland”.

On 21 December 2016 the Commission issues the second recommendation on the rule of law in Poland.

On 26 July 2017 the Commission issues the third recommendation on the rule of law in Poland.

On 20 December 2017 the Commission triggers Article 7(1) of the TFEU against Poland. The Commission brings a complaint against Poland to the Court of Justice of the European Union in relation to the Law on the Ordinary Courts Organisation.

On 20 March 2018 Commission vice president Frans Timmermans notes that the 94-page response from Warsaw simply restates the government's position.

⁶⁴ European Commission, Reasoned Proposal under Article 7(1) for a Council Decision regarding rule of law in Poland, 20.12.2017, p. 6, http://ec.europa.eu/newsroom/just/document.cfm?action=display&doc_id=49108.

While the Commission struggled, the Council and member states looked on. A Council meeting in May 2017 noted:

“There was broad agreement within the Council that the rule of law is a common interest ... Member states call on the Polish government to resume the dialogue ... and look forward to being updated.”

The next Council meeting in September 2017 concluded in exactly the same manner:

“There was broad agreement on the fact that the rule of law is a common interest and a common responsibility and on the need for Poland and the Commission to engage in a dialogue in order to find a solution.”

While the Commission finally triggered Article 7 in December 2017 one third of member states could have triggered Article 7 as well. Member states were aware of the detailed analyses by the Commission. They chose not to act.

This is the background against which to assess recent negotiations between Warsaw and the European Commission. On 8 December 2017 Mateusz Morawiecki, an anglophone ex-banker, became Polish prime minister.⁶⁵ On 9 January Morawiecki met Commission President Jean Claude Juncker.⁶⁶ Juncker declared then that he looked forward to “making progress by the end of February.”⁶⁷ On 14 February Juncker repeated: “I think there is a good chance the Polish positions will move toward ours.”⁶⁸ On 18 March German chancellor Angela Merkel visited Poland and explained: “I hope that the issue of Article 7 proceedings ... can be settled.”⁶⁹

There was no progress and nothing was settled. On the contrary: the President signed the laws on the National Council of the Judiciary and on the Supreme Court on 21 December 2017, just a few hours after the Commission triggered Article 7. A Polish government White Book explaining on 8 March that triggering of Article 7 was “groundless.” The judges-members of the NCJ were dismissed in April 2018, when the new law on the Supreme Court also entered into force.

Nonetheless, some in the Commission did not give up. On 3 April Juncker announced that he viewed promises of concessions by the Polish government “with a lot of sympathy.”⁷⁰ In early

⁶⁵ Christian Davis, Poland’s prime minister sacks ministers in move to mend ties with EU, Guardian, 9.1.2018, <https://www.theguardian.com/world/2018/jan/09/poland-prime-minister-dismisses-senior-cabinet-members-law-and-justice-relations-eu-mateusz-morawiecki>.

⁶⁶ Barbara Bodalska, Polish PM Morawiecki to meet Juncker over dinner for the first time, Euractiv, 9.1.2018, <https://www.euractiv.com/section/justice-home-affairs/news/polish-pm-morawiecki-to-meet-juncker-over-dinner-for-the-first-time/>.

⁶⁷ Martin Banks, Juncker and Polish leader meet in “friendly” atmosphere, The Parliament Magazine, 10.1.2018, <https://www.theparliamentmagazine.eu/articles/news/juncker-and-polish-leader-meet-friendly-atmosphere>.

⁶⁸ Robert-Jan Bartunek, EU’s Juncker says “good chance” of rapprochement with Warsaw, Reuters, 14.2.2018, <https://www.reuters.com/article/us-eu-poland-juncker/eus-juncker-says-good-chance-of-rapprochement-with-warsaw-idUSKCN1FY1MR>.

⁶⁹ Pawel Sobczak, Marcin Goettig, Merkel hopes Poland can satisfy EU concerns over judicial reform, Reuters, 19.3.2018, <https://www.reuters.com/article/us-germany-poland/merkel-hopes-poland-can-satisfy-eu-concerns-over-judicial-reform-idUSKBN1GU11M>.

⁷⁰ Florian Kellermann, Polen will Justizreform nachbessern, Deutschlandfunk, 3.4.2018, http://www.deutschlandfunk.de/streit-mit-der-eu-polen-will-justizreform-nachbessern.795.de.html?dram:article_id=414611.

May the Financial Times and other international media wrote that “Poland offers fresh concessions to the EU over legal reforms.”⁷¹ They referred to “concessions” presented by the Polish government on 22 March.⁷² A closer look reveals that these did not change anything to preserve the independence of Polish courts.

The government agreed to publish three verdicts of the constitutional court from 2016 (all of them declaring that PiS’s changes in the constitutional court had violated the Polish constitution). However, this would *not* mean that the verdicts would be implemented. Instead, the government would declare that the rulings of the court were issued under violation of the law.⁷³ On 21 May the rulings were still not published. But even if they were, nothing would change.

The government accepted that both male and female judges would retire at the same age (65). This is positive; however, it does not stop the mass early retirements of Supreme Court judges in July 2018. The government also accepted that the minister of justice would after all not be able to remove court presidents without any justification (it was possible between October 2017 and March 2018). Instead, the minister needs to ask for the opinions of the college of judges of the respective court and of the NCJ. However, his decision to dismiss a court president can be prevented only if the NCJ opposes it with a 2/3 majority of votes. In the meantime (in March 2018) the NCJ was completely restructured and is now controlled by members chosen by PiS.

The government tweaked its idea that already closed court cases might be reopened before a new chamber of the Supreme Court (to be staffed with new judges). Now only two institutions will be able to introduce such extraordinary appeals: the Ombudsperson and the minister of justice.⁷⁴

Finally, the Commission had demanded that the government refrain from actions which would undermine the legitimacy of the judiciary. The opposite has happened, as seen with cases like the one of judge Czeszkiewicz as well as the state-financed campaign “Fair Courts” aiming to discredit judges.⁷⁵

Foreign Minister Jacek Czaputowicz was open about the point behind these cosmetic “concessions” on 4 May: “We want to show some openness to the Commission’s demands in

⁷¹ James Shotter, Evon Huber, Poland offers fresh concession to EU over legal reforms, Financial Times, 3.5.2018, <https://www.ft.com/content/8311fe36-4eda-11e8-a7a9-37318e776bab>. See also Der Standard, Polen will in Justizstreit mit EU teilweise nachgeben, 4.5.2018, <https://derstandard.at/2000079178721/Polen-will-im-Justizstreit-mit-der-EU-teils-nachgeben>; Marcin Goettig, Pawel Sobczak, Poland plans new concessions to EU over contested court reforms, Reuters, 4.5.2018, <https://uk.reuters.com/article/uk-eu-poland/poland-plans-new-concessions-to-eu-over-contested-court-reforms-idUKKBN1I524B>.

⁷² Poland plans concessions on judicial reforms to assuage EU concerns – lawmaker, Reuters, 22.3.2018, <https://uk.reuters.com/article/uk-eu-poland-judicial/poland-plans-concessions-on-judicial-reforms-to-assuage-eu-concerns-lawmaker-idUKKBN1GY2OU>.

⁷³ “Mała niespodzianka od klubu PiS”. Rząd opublikuje wreszcie niekorzystne dla PiS wyroki TK, Gazeta Wyborcza, 22.3.2018, <http://wiadomosci.gazeta.pl/wiadomosci/7,114884,23177621,rzad-opublikuje-wreszcie-niekorzystne-dla-pis-wyroki-tk-projekty.html>.

⁷⁴ The bill introducing these changes still needs to be signed by the President. The extraordinary appeal is already in force as adopted in the original law on the Supreme Court.

⁷⁵ Ewa Siedlecka, Grillowanie sędziów, Polityka, 16.05-22.05.2018. The Polish National Foundation to launch its “Fair Courts” campaign abroad, TVN24, 31.10.2017, <https://www.tvn24.pl/tvn24-news-in-english,157,m/the-polish-national-foundation-to-launch-its-fair-courts-campaign-abroad,786067.html>.

order to close this case and deal with other important European matters like the budget.⁷⁶ This should surprise no one. The White Book presented on 8 March 2018 was unapologetic.⁷⁷ On 22 March the Polish prime minister was equally blunt:

“The essence, the most important elements of the reform remain untouched. At the same time we are looking at what would allow the other side to say: Oh, one can reach a compromise with Poland.”⁷⁸

The Polish Secretary of State for EU affairs told a German radio on 3 April: “We make a concession regarding issues which do not play any central role in the judiciary system.”⁷⁹

The Polish government can also rely on allies in other EU member states. Hungarian prime minister Viktor Orbán repeatedly assured Kaczyński that Hungary would use its veto power to prevent any sanctions under Article 7, if the procedure ever got that far. The two leaders flaunted their alliance publicly. On 7 September 2016, Kaczyński and Orbán gave a joint press conference in Southern Poland. The Financial Times reported some of their statements:

“Orbán: ‘There is a saying in Hungary that if you trust somebody, we say ‘you can steal horses together’.’ Kaczyński: ‘There are a few stables, and one particularly large one called the EU, where we can steal horses with Hungarians.’”⁸⁰

The leaders of PiS ignored the advice of the Venice Commission, the Parliamentary Assembly of the Council of Europe (PACE), ODIHR, the UN, international legal NGOs and the European Commission. They know what they want. They managed to prevail in the face of the combined opposition of most of the legal establishment and all courts in Poland. Ruthless determination had worked. It is a rational expectation from PiS that it will continue to do so.

The Court and the Commission – what to do now

The European Commission has asked the member states to state clearly that they are concerned about the collapse of the rule of law in Poland. Member states are to urge Poland to restore the independence of the Constitutional Tribunal and to ensure that the law on the Supreme Court, on ordinary courts, on the National Council for the Judiciary and on the National School for judges and prosecutors are amended. The leadership of PiS has instead made clear its objective: to carry out its reconstruction of society and of all public institutions. As PiS leader Kaczyński put it in January 2018:

⁷⁶ Marcin Goettig, Paweł Sobczak, Poland plans new concessions to EU over contested court reforms, Reuters, 4.5.2018, <https://uk.reuters.com/article/uk-eu-poland/poland-plans-new-concessions-to-eu-over-contested-court-reforms-idUKKBN1I524B>.

⁷⁷ Tomasz Bielecki, Premier Morawiecki przedstawił w Brukseli “białą księgę” ws. TK i sądów. Ani kroku wstecz, Gazeta Wyborcza, 8.3.2018, <http://wyborcza.pl/7,75399,23117570,premier-morawiecki-przedstawil-w-brukseli-biala-ksiega-ws.html>.

⁷⁸ Marcin Goettig, Polish PM – concessions to EU will preserve essence of judicial reforms, Euronews, 23.3.2018, <http://www.euronews.com/2018/03/23/polish-pm-concessions-to-eu-will-preserve-essence-of-judicial-reforms>.

⁷⁹ Florian Kellermann, Polen will Justizreform nachbessern, Deutschlandfunk, 3.4.2018, http://www.deutschlandfunk.de/streit-mit-der-eu-polen-will-justizreform-nachbessern.795.de.html?dram:article_id=414611.

⁸⁰ Duncan Robinson, Horse stealing in Warsaw, Budapest and Brussels, Financial Times, 7.9.2016, <http://blogs.ft.com/brusselsblog/2016/09/07/horse-stealing-in-warsaw-budapest-and-brussels/>.

“Poland will not make any concessions in its dispute with the European Union over the country’s judicial reforms ... The program of deep changes in our country will not slow down, on the contrary – there cannot be any talk about reaching an agreement with powers that for years treated Poland as their own private loot.”⁸¹

It is a matter of a few more weeks before the reconstruction of the Polish judicial system will be complete by July, while Poland’s prime minister tells other EU leaders that the dispute with the European Commission is just a “misunderstanding”:

“All year, we have struggled with the widespread misunderstanding of our plans to reform Poland’s deeply flawed judicial structure ... It is time for us to explain ourselves better, because our cause is just.”⁸²

So what is to be done? Here are a number of concrete steps that can be taken now.

First, the European Commission must not withdraw the infringement procedure it initiated on 20 December 2017 on the law on the ordinary courts.

Second, the European Commission, based on the Article 258 of the Treaty on infringement procedures, should take the law on the Polish Supreme Court to the CJEU for violating the fundamental EU principle of independence of courts, enshrined in the EU Treaty and the Charter of Fundamental Rights of the EU.⁸³ The CJEU has recently stated that it has the right to assess threats to the independence of national courts. In a recent landmark verdict on salaries of Portuguese administrative court judges (*C-64/16 Associação Sindical dos Juizes Portugueses*) the CJEU argued that it had the right to assess whether courts in member states operated in line with common EU rule of law principles:

“The European Union is a union based on the rule of law in which individual parties have the right to challenge before the courts the legality of any decision or other national measure relating to the application to them of an EU act ... It follows that every Member State must ensure that the bodies which, as ‘courts or tribunals’ within the meaning of EU law, come within its judicial system in the fields covered by that law, meet the requirements of effective judicial protection ...

The concept of independence presupposes, in particular, 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**

⁸¹ Kaczyński: Nie zmieniamy kursu, *Gazeta Polska Codziennie*, 26.1.2018, <https://gpcodziennie.pl/79632-kaczynskiniezmieniamykursu.html>.

⁸² Mateusz Morawiecki, Why my government is reforming Poland’s judiciary, *Washington Examiner*, 13.12.2017, <https://www.washingtonexaminer.com/prime-minister-mateusz-morawiecki-why-my-government-is-reforming-polands-judiciary/article/2643279>. He continued: “In the 1989 Roundtable Talks between Poland’s Communists and the democratic opposition, then-president General Wojciech Jaruzelski – the man who ran Poland’s martial law government for the Soviets – was allowed to nominate an entirely new bench of Communist-era judges to staff the post-communist courts. These judges dominated our judiciary for the next quarter century. Some remain in place.”

⁸³ Article 258: “If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.” See also: Maciej Taborowski, CJEU Opens the Door for the Commission to Reconsider Charges against Poland, *Verfassungsblog*, 13.3.2018, <https://verfassungsblog.de/cjeu-opens-the-door-for-the-commission-to-reconsider-charges-against-poland/>.

interventions or pressure liable to impair the independent judgment of its members
and to influence their decisions.”⁸⁴

Two provisions in the new law on the Supreme Court, which entered into force in April 2018, clearly violate these principles: the enforced early retirement of judges before the end of their tenure and the discretionary power of the President of Poland to allow them to continue to work after retirement (twice for 3 years) without any clear criteria or any possibility to appeal.⁸⁵ Stopping the dismissal of dozens of judges of the Supreme Court on 3 July is of utmost importance. Otherwise the parliamentary majority will be able to install around 70 new judges and form the majority in the new Supreme Court at one stroke. Once the new judges are in place, their nomination will not be reversible even by a new government.

In accordance with the rules for infringement procedures the Commission should send a notification letter to Warsaw, calling on it to amend or repeal the laws. In the letter the Commission would give the government two weeks to respond, instead of the usual two months. This shortening of the deadline would be easily justified by the fact that the Commission has repeatedly and in detail informed Warsaw about its reservations regarding the law as part of the rule of law supervision and sanction procedures. If the government does not change the provisions listed in the notification letter the Commission should send a reasoned opinion to the government on the violation of EU law by Poland. The government will be given a two-week response period.⁸⁶ Then the case will be dealt with by the CJEU.

At the same time the European Commission should file a motion for interim measures to suspend the application of the regulations on the dismissal of retired judges until the case has been decided on by the CJEU. This is possible within the framework of the infringement procedure if the application of the disputed law gives rise to practically irreversible effects. The forced early retirement of dozens of sitting judges is undoubtedly such a case. This move might still prevent the demolition of the Supreme Court.

The recent CJEU verdict on the Portuguese administrative court from February 2018 opened the door for a ruling by the Luxembourg court on recent changes to the Polish judicial system. The main challenge is that the Commission acts quickly. A motion needs to be filed until the beginning of June – which means in the coming days. If it does not happen by then, it will be too late to stop the dismissal of judges.

At the same time the CJEU in Luxembourg will need to issue a verdict on the Irish case brought by Judge Aileen Donnelley in March 2018. When it submits its own position to the court the Commission should support the judgement of the Irish judge, which is based on its own analysis of the situation in Poland.

⁸⁴ Judgment on Associação Sindical dos Juízes Portugueses v Tribunal de Contas, CJEU, 27.2.2018, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=199682&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=545683>.

⁸⁵ Piotr Buras, Katarzyna Pełczyńska-Nałecz, Nasz trybunał w Unii, Gazeta Wyborcza, 25.5.2018, <http://wyborcza.pl/7,75968,23449635,nasz-trybunal-w-unii-zostaly-dwa-tygodnie-na-obronie-niezaleznych.html>.

⁸⁶ Joanna Popielawska, How Brussels can stop changes to the judiciary, Polityka Insight, 21.5.2018, <https://www.politykainsight.pl/en/europe/polandintheetu/1749338.1.how-brussels-can-stop-changes-to-the-judiciary.read>.

Of course, the Commission and the CJEU cannot be the only actors in this drama. Until now member states have outsourced the defense of the rule-of-law to the Commission in the hope that it would sort itself out. By now it should be clear that it will not.⁸⁷

What is required is for the CJEU and member states to act in the mutual expectation that they are committed to uphold the rule of law and will do whatever they can. The CJEU must arbitrate – and be afforded the opportunity to arbitrate – in a manner consistent with the EU’s core legal principles and requirements; while member States, the Commission and the European Parliament must express, through the political levers at their disposal, their profound attachment to the rule of law.

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 confidently: “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 states: “Everyone is entitled to a fair and public hearing within a reasonable time by **an independent and impartial tribunal** previously established by law.”⁸⁸ 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. There is no more time to lose to protect it.

⁸⁷ Piotr Buras, Europe, stand up to Poland, Politico, 3.1.2017, <https://www.politico.eu/article/europe-stand-up-to-poland-rule-of-law-commission-recommendations-pis-jaroslaw-kaczynski/>.

⁸⁸ Article 47 of EU’s Charter of Fundamental Rights.

ANNEX: Further reading – key documents

European Commission Reasoned Opinion on art. 7 2017/0360,
<https://ec.europa.eu/transparency/regdoc/rep/1/2017/PL/COM-2017-835-F1-PL-MAIN-PART-1.PDF>.

Court of Justice of the European Union verdict on the Portuguese judges which opens the door for the ECJ to decide directly on the breach of rule of law in any member state. C-64/16 Associação Sindical dos Juízes Portugueses,
<http://curia.europa.eu/juris/document/document.jsf?text=&docid=199682&pageIndex=0&doclang=PL&mode=lst&dir=&occ=first&part=1&cid=545683>.

Irish judgement on preliminary question to the Court of Justice of the European Union (Judge Donnelly – Artur Celmer case),
<http://www.statewatch.org/news/2018/mar/ireland-Minister-v-Celmer-final.pdf>.

Marcin Matczak, 10 Facts on Poland for the Consideration of the European Court of Justice, Verfassungsblog, 13.5.2018, <https://verfassungsblog.de/author/marcin-matczak/>.

Association of Polish Judges Iustitia, Response to the White Paper compendium on the reforms of the Polish justice system, presented by the Government of the Republic of Poland to the European Commission, 16.3.2018,
<https://www.iustitia.pl/informacje/2172-response-to-the-white-paper-compendium-on-the-reforms-of-the-polish-justice-system-presented-by-the-government-of-the-republic-of-poland-to-the-european-commission>.

About us

European Stability Initiative (ESI) is a non-profit association providing analysis and solutions to strengthen European democracy (www.esiweb.org).

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