

ESI newsletter 7/2019  
16 December 2019

### **How the rule of law dies ... is this possible inside the EU?**



"People do not immediately realise what is happening. Many continue to believe that they are living under a democracy. In 2011, when a Latinobarometer survey asked Venezuelans to rate their own country from 1 ("not at all democratic") to 10 ("completely democratic"), 51 percent of respondents gave their country a score of 8 or higher."

(From: [How Democracies Die](#))

"An independent judiciary is the cornerstone for democracy and the rule of law ... The current situation in Venezuela demonstrates the consequences of the absence of an independent judiciary capable of guaranteeing the right of every person to participate in peaceful protests without becoming a victim of criminalization or repression."

(From: ICJ, [Strengthening the Rule of law in Venezuela](#), 2014)

Dear friends,

Please find attached the latest ESI-Batory paper on one of the most dramatic developments in the European Union today:

ESI-Batory paper:  
[Poland's deepening crisis – When the rule of law dies in Europe](#)  
14 December 2019

What is at stake in Poland today is the future of the EU as a project based on the rule of law. 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."

Every day 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. And there are today many reasons to doubt that effective judicial protection exists in Poland. 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 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 replaced them by members chosen by the parliamentary majority.

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

## Escalation in Warsaw



*Minister of Justice Zbigniew Ziobro and  
PiS party president Jarosław Kaczyński*

On 19 November 2019 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. The Disciplinary Chamber sits at the top of a disciplinary system for judges which the minister of justice controls and has already started to abuse. All its members have been selected by the reorganised National Council of the Judiciary, four fifths of whose members were appointed by PiS.

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, which 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 following the CJEU ruling and EU law.

### What the PiS government says it wants



*Lukasz Piebiak Stanislaw Piotrowicz*

*Former deputy minister of justice    New judge at Constitutional Tribunal  
Coordinated smear campaigns    Former PiS MP and architect of "judicial reform"  
against critical judges    Former communist prosecutor*

On 20 November 2019 Polish President Andrzej Duda explained the official reason why the Law and Justice (PiS) party government seeks to restructure the Polish judiciary. At a meeting with voters in a small town near the Baltic Sea he explained:

"There is a group of judges in the Supreme Court who were not only members of the communist party before 1989, but there are also those who lied about the fact that as judges they were also party officers during martial law! Today, they are pretending to be fair and honest! I will repeat this once again and I will not hesitate to say it: it is high time that such people would leave our judiciary."

These are the facts, though:

- Out of all 120 judges in the Polish Supreme Court today only three adjudicated "during martial law." All three had to give an account of their role at were cleared.
- In 2018 President Andrzej Duda appointed one of these three, Jozef Iwulski, as temporary President of the Supreme Court when PiS tried to force the current president to retire early.

Also, on 6 December 2019 President Duda swore in a new member of the Constitutional Tribunal: Stanislaw 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 and was awarded a cross of merit in 1984 by the regime.

It is obvious that it is not the presence of communists among Polish judges that disturbs the PiS government, but the idea of courts not under its control. This was bluntly explained by the former deputy minister of justice, 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.

### **How to protect the rule of law now**

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.

The Polish government believes that it is on the brink of victory. In a speech on 11 November President Andrzej Duda launched another attack against critical judges of the Supreme Court and then declared: "We will sit them out."

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."

European Commission

**"European Commission launches infringement procedure to protect judges in Poland from political control"**

3 April 2019.

The risk is that 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 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. This would reduce the threat hanging over those judges still committed to the preservation of independent courts.

Second, the Commission should request from the CJEU an 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.

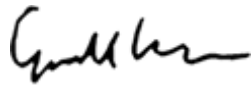
Third, member states must warn the Polish government against the grave consequences of undermining the independence of courts. They must focus on the mounting threat of the

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. It is 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.

Yours sincerely,



Gerald Knaus



*ESI-Rafto Brainstorming in Berlin on Poland (November 2019)  
Polish Ombudsman Adam Bodnar (centre), his deputy Maciej Taborowski (left) and Piotr Buras*

## Omtzigt – a fighting Dutchman



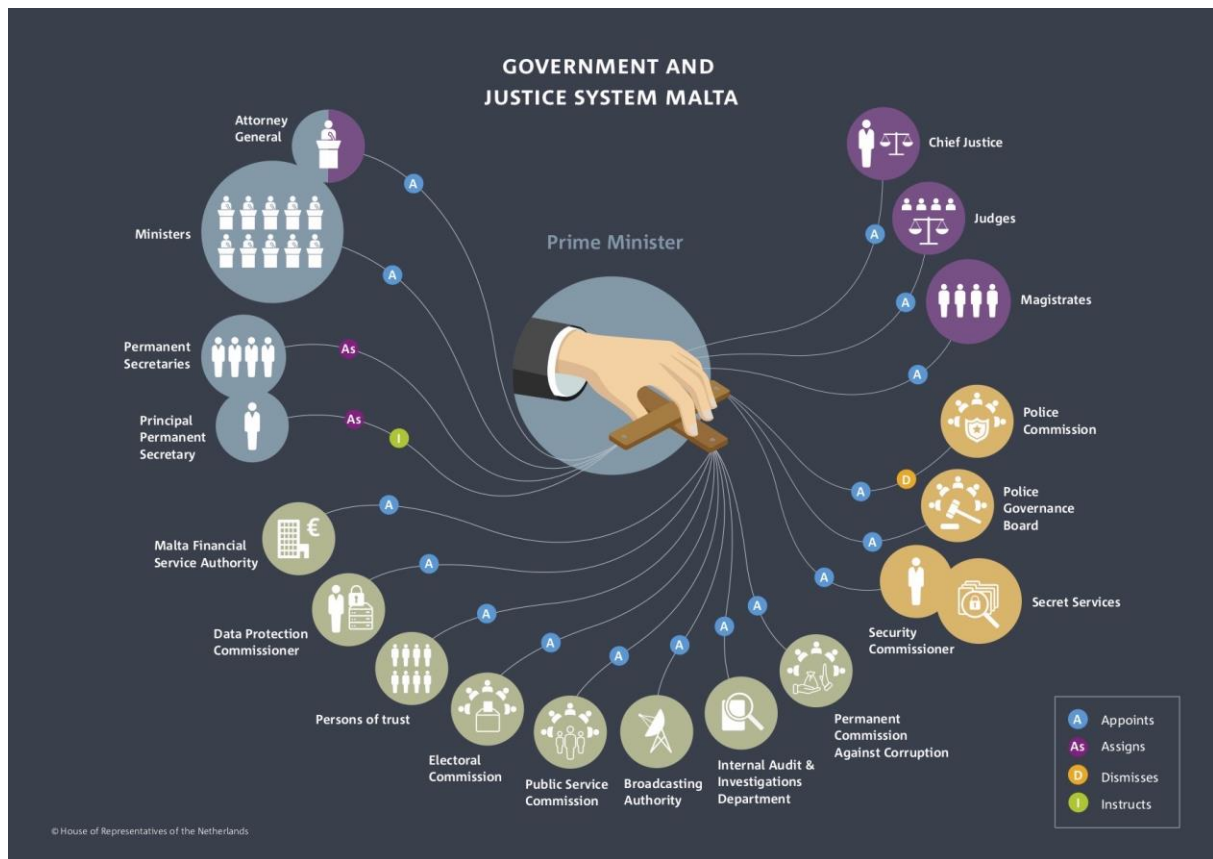
*Pieter Omtzigt, Dutch MP and rapporteur in PACE on Poland*

Pieter Omtzigt, Dutch Christian-Democrat MP and member of the Parliamentary Assembly of the Council of Europe (PACE), has been at the forefront of fighting for the rule of law in Europe for many years, from Azerbaijan to Poland.

In 2017 he **pushed the Council of Europe** to take allegations of corruption and charges of caviar diplomacy seriously. The result was **an independent investigation** into the most serious corruption scandal in the history of the Council of Europe.

In May 2019 **a report Omtzigt prepared on Malta following the assassination of investigative journalist Daphne Caruana Galizia** was adopted with an overwhelming majority by PACE. It describes "systematic failings" in the rule of law in Malta. It quotes the Venice Commission on the urgent need for checks and balances to be reinforced. It quotes GRECO, the anti-corruption body of the Council of Europe, noting a "feeling in the public that senior officials benefit from a total impunity for their actions." And it concludes:

"Malta's weaknesses are a source of vulnerability for all of Europe ... if Malta cannot or will not correct its weaknesses, European institutions must intervene."



### *Government and justice system of Malta*

Just last week Omtzigt presented a new report on the crisis of the rule of law in Poland as one of two rapporteurs of PACE:

"The Committee deplores the abuse of disciplinary proceedings against judges and prosecutors in Poland, which has a chilling effects on the judiciary and undermines its independence ... concerns about Poland's adherence to the rule of law, directly affect Europe as a whole and cannot be considered as an internal issue of Poland."

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

### **Further reading**

The same message of **urgency is also found in an open letter from 11 December to the President of the European Commission**, sent by leading scholars on the rule of law in Poland. The letter warns:

"The time has come to accept we are facing a situation in which EU law has broken down. Interim measures are called for before the situation gets worse and irreparable damage is done."

(Open letter by Laurent Pech, Kim Lane Scheppele, Wojciech Sadurski)

ESI and the Polish Batory Foundation have also written a lot on this crisis in the past two years.



On 29 May 2018 we published a [joint report](#) on the rule of law in Poland. We made a concrete recommendation then, which was adopted: 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 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."

This happened a few weeks later.

For more background on this crisis see also:

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: [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)

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