

ESI newsletter 1/2019
27 March 2019

Poland's most dangerous politician – Juncker's legacy



Dear friends,

Zbigniew Ziobro, Poland's minister of justice, is not a household name across Europe today. He should be. For if Ziobro's vision and policies prevail in Poland the European Union will soon face an existential crisis. Zbigniew Ziobro will have secured a form of Pol-exit. While his country would not *formally* leave the EU it would break up its legal unity from within.

Today Polish courts are under siege. A Polish judge given a sensitive case, perhaps a business deal involving members of the governing party or a criminal case the government has strong views about, is not "protected against external interventions or pressure liable to impair her independent judgment", which is what the Court of Justice of the European Union in Luxembourg requires of all courts in the EU. Polish ministers of justice, in this or any future government, can threaten, pressure and punish judges. New disciplinary procedures make this all too easy. And it is already happening.

It does not take a law degree to understand what is at stake. Across Europe national courts accept the judgements of courts in other member states. Judges (must) assume that courts across the EU operate according to common values and principles set out in the European Union treaty and in its Charter of Fundamental Rights. Once judges across the EU have reason to doubt whether courts in any member state provide effective judicial protection, the legal order on which the EU rests collapses. This would cause a crisis far deeper than Brexit.

Last week ESI and the Polish Batory Foundation presented our second joint report on the crisis of the rule of law in Poland in the European Parliament in Brussels:

NEW: ESI-Batory paper:
Under Siege – Why Polish courts matter for Europe

NEW: ESI-Batory legal opinion:
The disciplinary system for judges in Poland – The case for infringement proceedings
 (22 March 2019)

The "Under Siege" report builds on our earlier paper from 29 May 2018:

ESI-Batory paper:
European tragedy – the collapse of Poland's Rule of law

This newsletter sets out why Europeans have reason to fear what Ziobro has done. It also proposes a concrete response how the European Commission and the Court of Justice of the EU can save the rule of law and establish a red line for the future. It concludes by highlighting why this should be done now, and why Commission president Jean-Claude Juncker in particular has an interest to do so.

A dangerous man for justice



The future face of justice in Europe?

Zbigniew Ziobro was born in 1970. He studied law in Krakow. In 2001 he became one of the founders of the Law and Justice (PiS) party. In 2005 he became minister of justice for the first time. Since 2015 he has been a lead architect and the biggest beneficiary of his governments' "judicial reforms". As a result, he accumulated power like no other minister of justice in Europe:

- In 2018 Ziobro appointed new national disciplinary officials. These soon began to initiate disciplinary investigations against judges who have been particularly outspoken in their criticism of the judicial reforms.
- Since April 2018 Ziobro has the power to appoint a disciplinary official to investigate any of Poland's almost 10,000 ordinary judges. Even if such an investigation is closed, Ziobro can appoint another disciplinary official to examine the same allegations and issue binding instructions how to conduct it.
- Ziobro also now appoints the disciplinary court judges who hear disciplinary cases. He decides the number of disciplinary court judges attached to each court of appeal. His

ability to ensure that ideologically aligned judges hear disciplinary cases is not eroded over time: while disciplinary judges are appointed for six-year terms he can increase their number at any moment. And he easily can reward them in the future, as he also appoints court presidents (see below).

Ziobro now has to the power to appoint every single person involved in the investigation, prosecution and adjudication of disciplinary charges against ordinary judges in Poland. This is an extraordinary degree of influence of the executive over judges. And it is not all.

In July 2017 Ziobro was given absolute discretion to appoint and dismiss all presidents of ordinary courts in Poland within a six-month window. He used this discretion extensively. He was also given extensive permanent powers:

- Ziobro appoints the presidents of district, regional and appeal courts.
- Ziobro can dismiss court presidents on vague grounds of "gross or persistent failure to perform professional duties"; if the continuation of the president in office "cannot be reconciled with the interests of justice"; or on account of the inefficient administration of courts under their supervision.
- Whenever Ziobro dismisses a court president the assembly of that court is consulted. If it rejects the dismissal Ziobro can appeal to the National Council of the Judiciary which must in turn reject Ziobro's dismissal by a two thirds majority (17 of its 25 members) to prevent it. This is a high threshold under any circumstances. It is now even less likely as all 15 judge members of National Council of Judiciary were dismissed in 2018 and replaced by new ones appointed by the parliamentary majority of Ziobro's party. Ziobro is also a member of the National Council of the Judiciary himself.

Ziobro's power to appoint and dismiss court presidents is hugely important. In Poland court presidents have a lot of influence on the working lives of judges under their authority. These include:

- assigning judges to divisions and "determining the manner of their participation in the assignment of cases"; dismissing heads of divisions and their deputies;
- withdrawing, reassigning and adding judges to cases in the interests of "the efficiency of proceedings";
- ordering inspections (by "inspecting judges") of all activities of courts under their authority; reviewing the efficiency of proceedings in individual cases"; and
- admonishing the presidents of lower courts for management errors and reduce their salaries.

And this is still not all. Since March 2016, in addition to his control over disciplinary procedures and his control over court presidents Ziobro also controls Poland's prosecutors, as PiS once again merged the roles of Minister of Justice and the Prosecutor General into a single post:

- Ziobro appoints all prosecutors, instructs them, and can intervene in all cases. He can also disclose documents related to investigations to whomever he wishes.
- Ziobro purged the prosecutors' office. He dismissed six of seven of his deputies. He replaced the heads of all 11 provincial prosecutor's offices and 44 of 45 regional prosecutor's offices. He dismissed 90 percent of the heads of 342 district prosecutors' offices. He changed heads of departments at all levels as well as department directors. Within a few months he dismissed 1,000 of 6,100 prosecutors.

- Ziobro promotes prosecutors he likes, some twice in a year. Critics are put under pressure. Lex Super Omnia, an association of prosecutors, noted that almost every critical statement by prosecutors results in disciplinary actions. The president of the association faces 8 disciplinary charges in 4 proceedings.

Such a concentration of power in Ziobro's hands reflects his long-held vision. In 2007, when Ziobro was minister of justice and prosecutor general for the first time the Economist noted that he had "little regard for the separation of powers or for due process" and pointed to his "fondness for announcing investigations and arrests at press conferences, and his enthusiasm for setting his prosecutors on to political opponents."

In February 2018 Ziobro's deputy minister presented the vision of this government:

"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."

Saving the rule of law – for all Europeans



So what is to be done? Fortunately, the answer is clear: the European Commission needs to take Poland to the Court of Justice of the European Union (CJEU) as soon as possible for infringement of the EU's fundamental values and principles, focusing on disciplinary procedures and the executive's control over judges. The case is strong, and the need is great.

2018 has shown that while many of the tools at the disposal of the European Commission are weak, the European Union is not defenceless when it comes to defending the rule of law.

In fact, 2018 marked a turning point for the rule of law in Europe. In a landmark verdict in February concerning a salary dispute of judges in Portugal the CJEU in Luxembourg established a fundamental principle: that, as the ultimate guardian of the rule of law across the EU, it has the obligation to ensure that all citizens of the union enjoy effective judicial protection in their national courts. For this reason, courts in member states need to be "protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions."

The experience of the European Commission successfully challenging the Polish law on the Supreme Court in July 2018 before the CJEU has shown that legal challenges based on violations of the principle of the rule of law can work. In October 2018 the Polish government took back a highly controversial reform. And yet, this was just one battle in a much larger struggle to prevent the erosion of the rule of law in Poland.

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. Very few of these concerns have been addressed. The danger is that the Juncker Commission, in its last months in office, may concede defeat on the many changes that have undermined the rule of law in Poland in recent years. This is certainly what the Polish government is hoping for.

This is why today the European Commission has to take one more crucial step and launch another infringement procedure before the Court of Justice, focusing on the disciplinary regime for judges. EU member states should voice their support for this overdue step. All political groups that care about the integrity of the rule of law in the European Union should support it.

Juncker, Timmermans and their legacy



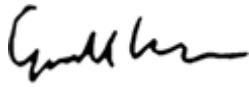
Going out with a bang and saving the rule of law? Juncker and Timmermans

Now that Commission vice president Frans Timmermans, who has played a key role dealing with Poland in the past four years, has entered the European parliamentary campaign as a leading candidate it is even more important that the battle to defend the rule of law is strongly backed by Commission president Jean-Claude Juncker.

By pushing for another infringement procedure and taking Poland to the CJEU in Luxembourg the outgoing president of the Commission would make clear that this is a matter of huge significance which goes beyond party politics. This step would restore hope to all European citizens who care about the fundamental values on which the EU is based: these can in fact be defended.

Let the successful defense of the rule of law be the lasting historic legacy of the Juncker Commission. It should finish what it started: proving that the principles of the treaty can in fact be defended.

Best regards,

A handwritten signature in black ink, appearing to read 'Gerald Knaus', with a stylized, cursive script.

Gerald Knaus

20 March 2019: presentation in Brussels

Brussels – ESI at the European Parliament: the collapse of the rule of law in Poland and what to do



*In Brussels with Adam Bodnar, the Polish Commissioner for Human Rights
ESI analyst Magdalena Milenkovska and ECFR's Piotr Buras*

Some other ESI news in 2019



ESI's Adnan Cerimagic in Pristina in March

11 March 2019: Pristina, Skopje, and Belgrade – ESI at conferences on the future of the Western Balkans

28 February 2019: Brussels – ESI at workshop on Georgia, Moldova and Ukraine

20 February 2019: Brussels – ESI at round table on EU-Western Balkans relations

12 February 2019: Freiburg – ESI at panel discussion on migration policy with Gesine Schwan

12 February 2019: Paris – ESI at conference on EU-Western Balkans relations

10 February 2019: Berlin – ESI at CDU "workshop debate" on migration policy

1 February 2019: Istanbul – ESI at event on civil society in Turkey

24 January 2019: Hamburg – ESI at Amnesty International event on refugee camps in Libya

22 January 2019: Brussels – Discussions with German and French officials on migration policy

15 January 2019: Berlin – ESI at public debate on climate change, migration, and refugees

ESI Senior Fellow John Dalhuisen

Today ESI senior fellow John Dalhuisen published an op-ed in **The New York Times**:

How to Win the Fight Over Europe's 'Refugee Crisis'



"A coalition of willing European governments should come together to ensure quick but fair processing of all asylum applications in reception centers in frontier states and to return those with no claim to protection to their countries of origin. For this, they reach agreements with these countries that speak to their actual interests; where possible, they return refugees to transit countries willing to receive them, but only if their rights are fully respected there, which requires investment and monitoring. Finally, they distribute recognized refugees from these centers across other participating European Union states."

"Mainstream European politicians and parties should endorse such a plan immediately, and then begin figuring out the details. That will be hard work, but less costly — and less dangerous — than not coming up with a plan. Doing nothing, or doing many things ineffectively, is not going to convince voters and certainly won't win back those seduced by populist fear-mongers. Democrats can beat populists this May by telling a better story and carrying out better policies. They have just two months to prove it."

Exactly one year ago John gave a long interview on the future of migration, asylum and human rights advocacy to **Frankfurter Allgemeine Sonntagszeitung**:

"Idealismus ist blind für Kompromisse"

"If you don't compromise you lose"

(26 March 2018):

On the third anniversary of the EU-Turkey statement on 18 March John's message remains highly relevant:

"Dalhuisen's concerns can be illustrated by a thought experiment: Imagine what Europe's parliaments would look like today if European politicians had fulfilled all the demands of human rights organizations over the past three years. If Macedonia, Hungary, Bulgaria and other states had not built fences. If the EU–Turkey Agreement had not been signed. If 'safe and legal passages' had been provided as not just 'Doctors without Borders' are calling for. If the influx of more than a million people per year had continued or risen further. If the summer of 2015 had kept on repeating itself. What would the election results have been in such a Europe, in France, Germany, Italy?"

"Established parties that would not have offered policies to control immigration in such a situation would have been swept away by the first party promising the opposite,' Dalhuisen surmises. He relates a two-hour conversation with a senior Italian politician he had when he was still Amnesty's Europe director. In Italy, the previous government – a centre-left government, mind you – has reduced the number of people arriving by striking 'deals' with militia leaders in Libya that are truly awful: Erstwhile people smugglers are now being paid to control Libya's shores, so no one can put to sea. In Libyan camps, captured refugees and migrants are exposed to the most severe violations of their human dignity, a modern slave trade has emerged. The Italian contact justified this dirty policy by not being able to control Italy's borders otherwise, recalls Dalhuisen. The man knew: If he does not do it, somebody else will come along and do it, quite likely through even more problematic means and with even fewer scruples. Although there are Italian politicians who are not comfortable with cooperating with Libyan militias, they also see no other way to reduce the number of arrivals and thus to counter the fears of a majority of Italians. 'No significant party in Italy has spoken out against this policy because they have no alternative offer.'"

But what follows from all this? Should Amnesty and similar groups back down and waive their concerns because the majority simply wants closed borders? "Of course not. But they should think more carefully about who their enemies are and who their potential allies." For those condemning the political mainstream that still recognizes Europe's human rights commitments for taking into account political majorities and making compromises - and those who even equate that mainstream with demagogues from left or right – who are they then left with as partners in politics where decisions are made? When Dalhuisen speaks of the "mainstream" he means the Merckels and Macrons, the moderate politicians who can only continue in European politics if they win elections.

As an example of the inability or unwillingness of human rights groups to distinguish between friend and foe, Dalhuisen mentions the debate on the 2016 EU–Turkey Agreement. The agreement foresees the return of irregular migrants arriving from the Turkish coast on the Greek islands to Turkey so that the life-threatening passage is no longer worthwhile. In turn, Syrians from Turkey were to be resettled to EU countries in an orderly process and larger contingents. Human rights organizations are up in arms against the agreement calling it a "dirty deal" (Pro Asyl). Indeed, there are weaknesses in its practical implementation. The assumption that Turkey is a safe third country for all irregular migrants is simply wrong. "But the contention that Turkey

is unsafe for everyone, which is why no one should be sent back, is equally wrong," says Dalhuisen."

More on the future of the EU-Turkey statement and European policy in the Mediterranean soon.

Further interviews and presentations by John:

Algemeen Dagblad (18 May 2018)

Republik (28 June 2018)

Die Zeit (10 October 2018)

Harvard Centre for European Studies (7 November 2018)
Summary of debate

La Vanguardia (20 February 2019)