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The Fragility of an Independent Judiciary: Lessons from Hungary and Poland – and the European Union[1]

Kriszta Kovács and Kim Lane Scheppele

By the time of the "big bang" accession in 2004, when ten new Member States entered the European Union, it seemed that the fate of East-Central Europe was settled. From that time forward, the westward states of post-communist Europe were certified as democracies in good standing, ready for membership in the most exclusive club in the world. At the time, political scientists spoke of "consolidated democracies" (Linz and Stepan, 1996), defined as countries in which democracy was the "only game in town" because there were no realistic alternatives. A country whose democracy was consolidated would stay a democracy forever. Or so the experts thought.

Before the first decade was out on the big bang accession, however, it became painfully clear that a consolidated democracy could come unraveled. Hungary's constitutional system began imploding shortly after 2010 so that by 2015, Freedom House lowered its assessment of Hungary from a consolidated to semi-consolidated democracy (Freedom House, 2015), the first time a consolidated democracy had officially fallen from grace. Shortly thereafter, Poland began a short, sharp slide toward autocracy, with Freedom House reducing its overall democracy score for 2018 to a level where it just barely hung onto consolidated democratic status (Freedom

[1] The events we describe in this chapter are fast moving. The chapter is current as of July 2018 and events after that date could not be taken into account here.

House, 2018). Since that score appeared, things have not improved. When it came to democratic consolidation, it turned out that what went up could also go down.

What happened? In both Hungary and Poland, parties with autocratically inclined leaders were voted into power with unprecedented majorities. The Fidesz party in Hungary won two-thirds of the parliamentary seats in the 2010 election, giving the party a constitutional majority, which it has largely retained to the present day.[2] The Law and Justice (PiS in its Polish acronym) party in Poland won an absolute majority of seats in the lower house of parliament in 2015, governing as a single party alone for the first time in the country's modern democratic history, while simultaneously capturing the presidency and the upper house of the parliament. In both cases, the elections could be seen as ordinary rotations of parties away from those that had already been in power for too long (Scheppele, 2018). But in both cases, these pivotal elections, which gave full legislative and executive power to a single party, spelled the beginning of the end of consolidated democracy in East-Central Europe.

It was each country's bad luck that the leaders of these successful parties – Viktor Orbán in Hungary and Jarosław Kaczyński in Poland – lied about their revolutionary ambitions before they were elected. Had these leaders been honest about their autocratic plans, it is unclear that either could have won. Once in office, however, both Orbán and Kaczyński began attacking key independent public institutions in order to eliminate them as veto points. The first institutions to be attacked were the constitutional judiciaries which were poised to hold Orbán and Kaczyński

[2] For two years between its second and third consecutive elections, Fidesz lost its two-thirds majority in two by-elections but sometimes managed to pass laws requiring "relative" two-thirds majorities (two-thirds of those present and voting). Constitutional amendments require an "absolute" two-thirds (two-thirds of all MPs).

to account under the constitutions they inherited. Once the constitutional courts were neutralized, the ordinary judiciaries were dismembered when they held out the possibility for individuals and opposition groups to challenge through law what these new autocratic governments were doing. Judicial independence, once quite strong in both Poland and Hungary, is now a thing of the past.

Perhaps no one was more surprised at democratic backsliding in East-Central Europe than the leaders of EU institutions, who – along with the academic consensus – had believed that consolidated democracy was irreversible. They had had faith that national institutions in general – and judiciaries in particular – could contain any values-based threat that might arise. The EU had carried out a thorough check of countries on their way in the door but made no provision for ongoing monitoring of the democratic health of Member States once they were admitted. Consolidated democracies were supposed to stay consolidated, so there seemed to be no need. At EU level, however, the deconsolidation of democratic government not only posed a threat of contagion, as we have already seen with the uptake of autocratic tactics now in Poland. But deconsolidation also threatened the operation of the EU as such. The Member State judiciaries are the institutions through which EU law is enforced throughout the Union. If they are disabled, the Member States are not the only ones who suffer, but the EU suffers too because its writ does not run throughout the EU if the national courts do not ensure uniform compliance with EU law.

It did not help that the European Union believed it had few tools to prevent democratic backsliding because the EU was designed to protect Member States from an overreaching Union rather than to protect the Union from failing Member States. Treaty change requires unanimous agreement among the Member States; even ordinary legislation cannot be passed without a

qualified majority approval of the Member States. Comitology ensured that the EU could not enforce the rules laid down in a manner too far from what the Member States would tolerate. Without the Member States supporting in force what the EU does, in other words, the EU can do very little. And the Member States do not contemplate being seriously sanctioned themselves. In the basic design of the EU, Member States largely protected themselves from sanction from the center. Member States can quit (hence, Brexit) but they cannot be thrown out.

The primary sanctions mechanism for values-based non-compliance in EU law is a political process identified in Article 7 of the Treaty on European Union (TEU) that requires supermajority agreement of the other Member States to identify a *risk* of non-compliance. It requires a *unanimous* judgment of all other Member States except the offender to determine that EU values have in fact been breached. With even one other fellow-traveler state supporting an offender, Article 7 TEU has been thought impossible to use. Now the EU has two. As we will see, the other legal process for ensuring the uniform enforcement of EU law, the infringement procedure, allows the European Commission to bring Member States to the European Court of Justice if the Member State violates EU law. But infringement procedures to date have been used for relatively technical violations – nothing so big as a threat to European values or the deconsolidation of a democratic state.

The attack on the national judiciaries is the most important element in the EU's democratic backsliding story because, with disabled judiciaries, no one can be assured of fair treatment once they challenge the government. If courts will not neutrally enforce the law – whether national or EU law – then it becomes impossible for those inside or outside the state to to counter the autocratic state through legal means. For that reason, we'll concentrate in this

chapter on the methods and results of the attacks on the judiciaries in Hungary and Poland, focusing on the interventions that the European Union attempted to make as the judiciaries were politically captured. First we'll explain what happened in Hungary and then we will turn to Poland. We'll conclude by explaining why the European Union has been so powerless (so far) to arrest the capture of the courts and what it could still do now.

I. Judicial Independence in Hungary

Hungary's national parliamentary election of 2010 occurred at a bad time for the country. Hungary had been hit hard by the global financial crisis when a housing bubble fueled by foreign-currency-denominated mortgages burst just as the government's debt itself became unsustainable. The IMF, the lender of last resort, bailed Hungary out in 2008, insisting on a program of radical austerity. Forced to make swingeing cuts to the state budget causing more pain all around, the Socialist government of the day was clearly going to lose the upcoming election in 2010. Besides, the Socialists had been in power for eight years, longer than any other post-communist Hungarian government and had presided over a moral crisis in which much of the Hungarian public believed that the sitting government was both corrupt and mendacious. As a result, voters in 2010 voted to elect the main opposition party at that time, Fidesz (which ran in coalition with a tiny almost non-existent party, the Christian Democrats).

The Fidesz-Christian Democratic coalition won a landslide victory in the general elections in 2010, which opened the way for a profound shift in the direction of the state even though the victorious parties did not campaign on a platform of constitutional reform. The lightly

entrenched 1989 democratic constitution, still in force at that time, could be amended by a single two-thirds vote of the Parliament, and the new government, headed by Prime Minister Viktor Orbán, had 68 per cent of the seats. This numerical reality gave Fidesz the possibility of changing the constitution at will. One year into its term, after the governing coalition had amended the constitution it inherited 12 times, it adopted a wholly new constitution without the support of any other party. This new "Fundamental Law," as it was called, signaled that the constitutional transformation had begun.

The Fundamental Law changed the fundamental characteristics of Hungarian constitutionalism. Instead of the universal principles of liberty, equality and democracy that had animated the old constitution, the new Fundamental Law now has its foundation in the contentious, nationalistic, historical and religious narrative of the preamble (Kovács and Tóth, 2011: 198ff). Moreover, the Fundamental Law aims at consolidating the power of the ruling parliamentary majority by restricting the competitive political process (Arato, Halmai and Kis 2012: 483). In the Hungarian system of government, a two-thirds governing majority is the supreme and constitutionally unlimited organ of state power because this majority can amend the constitution at will.

In its first few years, the Fundamental Law was elaborated by more than 800 new laws, changing the whole legal system established after the democratic transition of 1989. The new legal order rapidly removed virtually all of the checks on executive power that the first democratic constitution of 1989-1990 had managed to install (Bánkuti, Halmai and Scheppele, 2012). Previously, the judiciary and the Constitutional Court were the institutions that served as main checks on the power of governmental majorities. But already in 2011, European bodies

called the attention to the fact that neither the independence of the Constitutional Court nor the independence of the judiciary were expressly guaranteed in the Fundamental Law (Venice Commission, 2011: para 102; Venice Commission, 2012b: para 10). The European Parliament expressed concern about "the weakening of the system of checks and balances" (European Parliament, 2011: para F.). Similar concerns were raised by the Group of States against Corruption (GRECO, 2015). But the Hungarian government did not respond. The critics were proven correct in their warnings.

In Hungary's unicameral parliamentary system after 1990, the Constitutional Court was the strongest check in the constitutional structure. But immediately after its election in 2010, the Fidesz governmentattacked the independence and the competencies of the Constitutional Court. First, an early constitutional amendment of 5 July 2010 changed the selection procedure for the justices of the Constitutional Court and the election rules for the Court's president. Since then the president of the Court has been elected by a two-third vote of the Parliament while Constitutional Court judges have been nominated by a parliamentary committee that the governing party dominates, followed by a two-thirds vote of the Parliament, so only governing party votes are needed to select new judges (European Parliament, 2011: para Q). Later, through another constitutional amendment (Act LXI/2011), the parliamentary majority, noting that jurisdictional changes it had made under the new constitution increased the Court's workloads, changed the number of judges on the Constitutional Court from 11 to 15, so the government could select more judges for the Court without gaining support of any other parliamentary party. By spring 2013, the Constitutional Court was effectively neutralized as a check on government

because the governing coalition had named a majority of the judges who in turn refused to nullify almost any law that the government supported.

As the Court was being packed, however, it fought back. When it nullified a 98% retroactive tax on severance bonuses for those who had served in the last (non-Fidesz) government,[3] the governing coalition amended the *old constitution* (Act CXX of 2010) to restrict the competencies of the Constitutional Court so that the Court could no longer review the constitutionality of certain financial measures. The Venice Commission criticized this restriction (Venice Commission, 2012b: para. 38), and reiterated this criticism with growing urgency in repeated opinions (Venice Commission, 2013: para 113). But the government did not back down, instead eventually entrenching this restriction on constitutional review in Art. 37.4 of the Fundamental Law with the new constitution's Fourth Amendment in 2013.

The Fourth Amendment, which marked the final capture of the Constitutional Court by the governing coalition, also nullified the entire case law of the Constitutional Court from 1990–2011, so none of the decisions of the Court from before the enactment of the new constitution could be relied on as legal authority. The Fourth Amendment also inserted directly into the constitution nearly all of the legal provisions that the once-independent Constitutional Court had found unconstitutional after the Fidesz government took office (European Parliament, 2013: paras AM-AR). The entire activity of the Constitutional Court between its founding and the date of the Fourth Amendment was therefore destroyed as a matter of law by this amendment. To complete the government domination of the Court, the Fourth Amendment also prevented the

[3] Hungarian Constitutional Court Decision 184/2010 struck down the tax, a judgment that the European Court of Human Rights later upheld when it found that the former public servants had property rights in their bonuses which could not be taken away retroactively. N.K.M. v. Hungary, Judgment of 14 May 2013.

Court from reviewing all constitutional amendments, including the Fourth Amendment, for their compliance with the basic principles of the Fundamental Law.

While the Fundamental Law formally retained the Constitutional Court on paper, the changes in its functioning were considerable in practice. The Fundamental Law abolished the primary vehicle for constitutional challenges before that time: *actio popularis* petition, though which anyone could turn to the Constitutional Court to request review of the constitutionality of laws. There are now three ways that laws and normative acts can come before the Constitutional Court.

First, certain identified parties may ask for abstract constitutional review. The government itself, one-fourth of the MPs, the President of the Kúria (newly renamed Supreme Court), the Prosecutor General or the Ombudsperson for Fundamental Rights can initiate this procedure (Sec. 24.1 of Act CLI/2011 on the Constitutional Court). The government is unlikely to ask for review of its own legal acts, and the current President of the Kúria, the Prosecutor General and the Ombudsperson were all chosen by this government from among those friendly to their party. From this group, only the Ombudsperson has ever brought cases to the Constitutional Court and he has said that he only brings cases that he deems to be not "political" (IBAHRI,2015: 35). While the parliamentary opposition might be expected to bring abstract review cases, the current parliamentary opposition, less than one-third of the MPs, is divided almost equally between fragmented parties of the left and a party of the far right. Given this configuration, it happens very rarely that one-quarter of the MPs agree on constitutional challenges. Abstract review has therefore virtually disappeared when it was once the most common form of constitutional review. In 2017, only about 1 per cent of the Constitutional Court's caseload (4

cases out of 461) were based on abstract review petitions (Constitutional Court of Hungary, 2017).

A second way that cases can now come to the Constitutional Court is through the judicial initiative. If a judge is bound to apply a legal rule that she perceives to be unconstitutional, the judge shall suspend the proceedings and submit a petition to the Constitutional Court for its determination of the constitutionality of the law (Sec 25.1 of Act CLI/2011). But judges use this option rarely. In 2017, only about 10 per cent of the Constitutional Court's caseload, 48 out of 461 were judicial initiatives (Constitutional Court of Hungary, 2017).

The third possibility for bringing cases to the Constitutional Court, and by far the largest contributor to the Court's docket now, is the newly enacted constitutional complaint. By introducing a constitutional complaint against court decisions the Fundamental Law cleverly shifted the focus of the review from the law itself to its application.

In 2017, most of the petitions before the Constitutional Court (330 out of 461) challenged other court decisions (Constitutional Court of Hungary, 2017) and not the underlying state action or the underlying law itself.

From once having been the key check on executive and legislative power in the constitutional order, the Hungarian Constitutional Court has now both been packed with political allies and also had its wings clipped. The constitutionality of laws and of government actions can therefore not be guaranteed.

Capturing and neutralizing the Constitutional Court was just the beginning, however. The ordinary judiciary has been attacked as well. Beginning with Act CLXII/2011 on the Status and Remuneration of Judges, the independence of the ordinary courts has been threatened. This law

lowered the age-limit for compulsory retirement from 70 to 62-65 years according to a gradual system depending on the date of birth of judges. The vast majority of senior judges – between 10-15% of all judges in the country, and disproportionately including judges in the leadership of the courts – were forced to leave the bench almost immediately. The not-yet-packed Hungarian Constitutional Court in its decision 33/2012 found that lowering the judicial retirement age as applied to sitting judges was unconstitutional because it violated the principle of judicial irremovability. In response, the government inserted the already annulled provision on the retirement age into the Fundamental Law as an amendment (now Art 26.2 of the Fundamental Law). The Venice Commission strongly criticized the move and did not see "a material justification for the forced retirement of judges (including many holders of senior court positions)" (Venice Commission, 2012a: para 104). The European Commission also raised concerns about Hungary's decision to reduce suddenly the retirement age of judges (European Commission 2012, para G). The Commission brought an infringement action to the European Court of Justice which in turn held that premature judicial retirements were a violation of EU law on age discrimination (Commission v. Hungary, Case C-286/12, 6 November 2012). Hungary paid compensation but was able to avoid restoring the most important judges to their prior posts (IBAHRI, 2015). Though the Commission took rapid action to challenge this firing of judges and ECJ condemned the practice, the Hungarian government won the facts on the ground by keeping all of its newly appointed judges when the case (that they lost) was over.

At the same time as judges were being fired *en masse*, a unique system of judicial administration — existing in no other European country — was introduced through the abolition of the previous structure of judicial self-governance and the creation of a new National Judicial

Office (Act CLXI/2011 on the Organisation and Administration of Courts of Hungary). The president of the new National Judicial Office has the power to exercise the 'central responsibilities of the administration of the courts' (Fundamental Law, Art. 25.5), which also includes the power to appoint new judges conditioned only on the countersignature of the President of the Republic. This lone official is, therefore, the "crucial decision-maker in practically every aspect of the organization of the judicial system" (Venice Commission 2012a, para. 118). The current incumbent, elected by the parliamentary supermajority for a term of nine years, has complete discretionary power to promote and demote judges as well as transfer and reassign them, and she has a role in initiating and organizing judicial discipline. Her sweeping powers give her control over every aspect of a judge's career and, according to the Venice Commission, "the essential elements of the reform not only contradict European standards for the organisation of the judiciary, especially its independence, but are also problematic as concerns the right to a fair trial under Article 6 ECHR" (Venice Commission 2012a, para. 117). Although a so-called National Judicial *Council* composed of judges is also part of the system, it has scarcely any significant powers and plays only a negligible role in the administration of the judiciary. Given the new system, judges cannot enjoy true autonomy and independence from the National Judicial Office (European Parliament 2013, paras AV-BC).

The new system of political control over the courts also changed the qualifications for the presidency of the Supreme Court. These new qualifications had the effect of removing the incumbent president before the end of his lawful term. The European Court of Human Rights found that the premature termination of the President's mandate had violated the right of access to a court and the right to freedom of expression (Baka v. Hungary, Judgment of 27 May 2014),

but here too, the remedy was compensation and not reinstatement. It was hard to reach the principle of judicial independence through a human rights convention when the violation did not occur in the form of an unfair trial. As with the judicial retirement case at the ECJ, the Hungarian government lost the case but it got the new court president it wanted.

In 2011, the government began floating the idea of establishing a separate system of administrative courts. For years, however, the administrative court proposal was stalled because it proved surprisingly controversial among Fidesz loyalists. Unlike the other court-capturing laws which were forwarded with rationales that one might believe were connected to reasonable reform (e.g. getting rid of judges trained in the communist time, adding judges to a system that would now have more cases), this one seemed too obviously aimed at creating a separate court system for politically sensitive cases in which the government would always win by design. But in 2016, parliament passed two laws, Act CL/2016 on Administrative Procedure and T/12234 Act on Administrative Court Procedure, laws that would have created a parallel judiciary of administrative courts. The latter not yet promulgated Act was referred by the President of Hungary to the Constitutional Court for a preliminary review. In its Decision 1/2017, the Court declared the Act unconstitutional because the creation of new courts outside the regular judiciary required a constitutional majority of a two-thirds vote in the Parliament. But these laws had passed during a period when Fidesz lost its two-thirds majority in two by-elections, so it had counted on getting these laws through on a simple majority, which the Constitutional Court blocked. But the government proceeded as far as it could anyway; in February 2017, Parliament adopted Act I/2017 on Administrative Court Procedure without the contested provisions and both statutes entered into force on January 1, 2018.

Since then eight specialized administrative regional centers *within* the general judiciary have been tasked with a whole range of politically sensitive cases. They have the sole jurisdiction to rule in appeals against the administrative decisions of those public bodies that are supposed to be most independent of the government, like the Hungarian National Bank or the Hungarian Academy of Sciences. In these cases, politically aligned judicial review could reverse decisions that the government was otherwise not able to control. These regional courts also have unusual jurisdiction in two types of individual rights cases with political implications: 'right to assembly' cases that involve permits for public demonstrations and freedom of information cases that would expose the internal workings of the government if requests were granted (Sec. 12 of Act I/2017). These administrative chambers also hear appeals against the decisions of the county governments. But, operating as they have within the general judiciary, they have not ensured the degree of control over these cases that the governing party apparently wanted.

After the ruling coalition regained its two-thirds majority in the 2018 general election, it almost immediately pushed through the Parliament yet another amendment to the Fundamental Law, circling back to its earlier reforms that had been blocked. The Seventh Amendment to the Fundamental Law passed in July 2018 now permits the creation of a wholly separate public administration court system, including an Administrative Supreme Court that is separate from other public courts but with the same legal status as the Kúria. The task of the Administrative Supreme Court will be to review the application of the law by the administrative courts, and to make "uniformity decisions" guiding interpretation of the law which are binding on the administrative courts. The constitutional amendment has brought significant changes to the system of public administration which will require further lawmaking to fill in, but these rules are

not yet known. What is certain is that the new system of administrative courts will deepen the gap between the already existing two tracks of administrative procedures in Hungary: one dealing with core EU matters, where Hungary is careful to follow EU law, and the other dealing with domestic administration where the protections accorded to administrative review in the EU are missing (Kovács and Scheppele, 2017: 127). The purpose of the new administrative courts, in which earlier drafts have hinted that the "judges" will have neither legal training nor job security, seems to be to wall off administrative action from serious judicial scrutiny.

As these attacks on the independence of the judiciary continued over eight long years, some of the European Union institutions took note, made repeated criticisms, but ultimately did not succeed in altering the course of events substantially. The most aggressive action taken by the European Commission was the expedited infringement procedure brought against Hungary as the government fired judges *en masse* by lowering their retirement ages. But the Commission did not feel it could call what was happening by its proper name – interference with the independence of the judiciary. The Treaties *presume* that all states will have independent judiciaries; there was, as the Commission saw it then, no black-letter legal provision either in the Treaties or in the rest of EU law that would have permitted the Commission to charge Hungary with destruction of something whose existence was not explicitly legally mandated but only presupposed. So the Commission did the next best thing: charge Hungary with violating the prohibition on age discrimination. When the Commission won its case at the European Court of Justice, however, it won only the sort of remedy that discrimination cases bring, compensation for those who have been the victims. When the government compensated the judges, the case

had to be closed (Scheppele, 2016). But the Orbán government got to keep its captured judiciary. It was clear that the tools the European Commission felt it had were not up to the task.

The European Parliament was more active as the Hungarian government consolidated its control over the judiciary, passing resolution after resolution, most prominently on 3 July 2013 the "Tavares Report," named after its tenacious rapporteur who drafted a full-scale indictment of Hungary's slide into autocracy. But the other EU institutions – namely the Commission and the Council – largely ignored the parliamentary resolutions. The parliament may have been calling Hungary out on each move in its fall from European norms, but no one appeared to be listening. Throughout Hungary's long slide into autocracy, the Council failed to say a critical word.

As the Barroso Commission was nearing the end of its term in 2014, Vice President Viviane Reding proposed, and the Commission adopted, a new "Rule of Law Framework." Designed to allow the Commission to enter a dialogue with a backsliding Member State and to permit the Commission to give concrete warnings and specific recommendations as the Commission considered whether Article 7 TEU should be launched, the Rule of Law Framework became available for use by the Commission just as new European elections meant that all those who had worked on the case against Hungary left office. The new Commission elected in 2014 did not pick up where the old Commission left off. When the European Parliament later called on the European Commission to invoke its rule of law mechanism for Hungary, the Commission did not find it necessary to do so. It has filed some infringement procedures against Hungary but there has been no talk of using the Rule of Law Framework to assess whether Hungary should be

subjected to a warning under Article 7 TEU. Instead, Poland has occupied all of their energy, as we will see in the next section.

As we write, however, the European Parliament has before it the "Sargentini report" which, if it passes by the requisite supermajority in fall 2018, would trigger Article 7(1) with regard to Hungary. In this, neither the Commission nor the Council has been of much assistance and the Council would have to vote by a four-fifths majority to agree with the Parliament before a warning to the government of Hungary can issue.

II. Judicial Independence in Poland[4]

Politics in Poland, as in Hungary, had become very polarized by the time of the time of the 2015 national elections. The Civic-Platform-led government of the center-left had been in power for eight years, and its popular leader, Donald Tusk, had been drafted to Brussels to serve as the first new accession state president of the Council of the European Union. Headless and running out of ideas, with its national support slipping, Civic Platform was bound to lose. To make matters worse for the left, their supporters split their votes in the 2015 elections between Civic Platform and an upstart party called Modern Poland while the right voted *en bloc* for the PiS party. With only half the voters turning out, and the victorious PiS party winning only 37.5% of the vote of that participating half, PiS gained an absolute majority of seats in both chambers

[4] The narrative in this section is drawn from Wojciech Sadurski, 2018a and 2018b; European Commission, 2017; Venice Commission 2016a, 2016b and 2017.

of the Parliament, after having just won the Presidency in an election earlier in the year. With half-hearted support from half the population, an autocratic government was born.

Civic Platform committed the first constitutional offense, however, on its way out of office. Seeing an opportunity to pack the Constitutional Tribunal itself before suffering an election defeat, the Civic Platform government had changed the law under which constitutional judges were elected (25 June 2015 amendment to the Act on the Constitutional Tribunal). The old rule had been that the Parliament in power on the day that a judge's term ended had the legal authority to fill that seat, but under the new rule, the Parliament could elect judges months ahead of an actual opening on the court. Three judgeships came open under the old rule on Civic Platform's watch but the outgoing Parliament elected five judges under the new rule – filling two openings that had not yet materialized but that would open up soon after the new PiS Parliament was seated.

Given this unconstitutional maneuver (as the Constitutional Tribunal would later confirm in its judgment on 3 December 2015), PiS came to power with an "own goal" legal violation by Civil Platform from which PiS was determined to benefit. None of the Civic Platform judges had been sworn in by PiS President of the Republic Andrzej Duda, so technically the seats that had not been filled before the election were still open. The PiS Parliament therefore cancelled the election of all five Civic Platform judges, even though only two had been illegally elected (19 November 2015 amendment to the Act on the Constitutional Tribunal). Instead, PiS elected five of its own judges to fill all of the open seats. The Constitutional Tribunal, pulled into the political fight because it had to assess the legality of the election of all of these judges as well as the constitutionality of the laws under which they were all elected, properly found that three of the

judges elected by Civic Platform should be sworn in by the President along with two of the judges PiS had elected (Sadurski, 2018a). But President Duda refused to publish the decisions of the Tribunal and also refused to swear in any of the Civic Platform judges. Instead, President Duda swore in all five of the PiS judges. The President of the Constitutional Tribunal then refused to seat the three illegally elected PiS judges and the stand-off was on.

Unlike in the Hungarian case, where the European Commission watched nervously but did little as the judiciary was captured, European Commission this time got involved quite quickly. In December 2015, just as the stand-off between the Constitutional Tribunal and the government became serious, the Commission wrote to the Polish government, asking it to follow the decisions of the Constitutional Tribunal and to hold off on passing pending new legislation affecting the Tribunal until the Venice Commission could weigh in on the proposed bills. When the Polish government went ahead and passed the worrisome laws anyway without waiting for the Venice Commission report, the European Commission invoked its Rule of Law Framework – originally designed for but never used in the case of Hungary. Poland in January 2016 became the first target of this new tool. The PiS government had only been in office for a few months, but already the European Commission had acted decisively to bring EU oversight to bear.

The European Commission's intervention made no difference, however. During the whole of 2016, while the Constitutional Tribunal blocked the illegally elected PiS judges from taking their seats and the government refused to recognize the legal election of the Civic Platform judges, the PiS government bombarded the court with restrictive legislation. No fewer than six laws affecting the Constitutional Tribunal's procedures and powers were passed and signed into law during the stand-off. One new restriction required a two-thirds majority on the Tribunal

before a vote of the judges could nullify a law (despite the fact that the Constitution itself required only a simple majority decision). Given that the court was working at less than full strength while the controversy was going on, no such two-thirds could be attained. The situation was made worse by a new legal provision that allowed any three judges on the court to require that any case be heard *en banc* with all of the judges present, which meant that no case could be decided that PiS friendly judges wanted to avoid as long as the stand-off over the judges continued. To this was added a new requirement that the Prosecutor General be present for all cases of a full bench, so that the Prosecutor's absence would mean that a case could not proceed. (Shortly before this, the government had given the Justice Minister the Prosecutor General's portfolio, so this conditioned the Tribunal's ability to hold a hearing in a case on the specific presence of a particular member of the government.) Another restriction limited the court's review of laws to those that had been already in effect for six months, which in turn created a sort of constitutional vacuum around all new laws which could not be challenged before they went into effect. Yet another required the Tribunal to decide cases in the order in which they came in which meant that any cases involving the new PiS government would go to the back of the queue. In the meantime, the government refused to publish many of the opinions of the court.

Throughout this legal blitz, European institutions were active in criticizing these developments. In March, an opinion of the Venice Commission condemned the law restricting the Constitutional Tribunal's functioning (Venice Commission, 2016a). In April, the European Parliament passed a resolution supporting the decisions of the Constitutional Tribunal against the government (European Commission, 2016). Emboldened by this European support, the

General Assembly of the Supreme Court of Poland, consisting of all of the judges of the Supreme Court, passed a resolution stating that it would take the unpublished decisions of the Constitutional Tribunal as valid. In the meantime, the European Commission met with the Polish government on numerous occasions to persuade it to end the stand-off and follow the Tribunal's decisions.

When the government refused to bend, the Commission in June 2016 issued a Rule of Law Opinion, a formal document that recorded the Commission's objections, which – when it was met with no positive response from the Polish government – turned into a Rule of Law Recommendation in July (European Commission, 2016a). (Opinions and recommendations are terms of art in the Rule of Law Framework, indicating increasing levels of seriousness and concern.) The Recommendation stated that Poland in fact already suffered from a systemic threat to the rule of law and it demanded that Poland change its ways. The Polish government refused to comply – and instead barreled ahead with new legislation designed to cripple the Constitutional Tribunal further (2 August 2016 Act on the Constitutional Tribunal). The European Parliament adopted another critical resolution in September; the Venice Commission produced another critical report on another new law restricting the Constitutional Tribunal in October (Venice Commission, 2016b). And the stand-off between the government and the Constitutional Tribunal continued for a whole year, despite all of the European criticism.

The Constitutional Tribunal's stand-off with the government ended with the close of 2016. In December 2016, the term of the president of the court, Andrzej Rzeplinski, came to its normal end. He, supported by the other "legal" judges elected before 2015, had kept the illegal judges off the court to that point, but once Rzeplinski stepped down, the court was quickly

captured by the government. European institutions were again active through this process. Just as President Rzeplinski stepped down, the European Commission adopted a second Recommendation asking the Polish government to delay the process for selecting his successor (European Commission, 2016b). But one of the legally elected PiS judges, Julia Przylebska, was made "interim president" of the Tribunal (a completely new position) by a hastily passed statute, even though the pre-existing rules of the court specified that the sitting vice-president (a judge who had been elected prior to 2015) should preside over the selection of the next president. Interim President Przylebska was almost immediately then elected the president of the Tribunal in a highly questionable process over which she herself presided. Her election involved the violation of black-letter rules about how a new president of the Constitutional Tribunal should be selected (since she held only one vote of the other judges instead of two as required by law). And her elected resulted from illegally constituted vote. Interim President Przylebska simply didn't count the eight judges who refused to recognize her legal right to convene the proceedings as an "interim" president and who boycotted the proceedings but, to gain sufficient votes, she admitted all three of the illegally elected PiS judges to the bench just in time to vote for her. With these tricks, she narrowly won the election over which she presided and became President of the Tribunal. Several new vacancies on the Tribunal were engineered by the government's retroactive challenge to the legitimacy of the election of three non-PiS judges, who were then replaced before their terms expired in moves that allowed PiS to capture the court's majority by late spring 2017, less than two years into the PiS government's term.

As soon as the government gained a comfortable majority on the Tribunal, government's attempts to tie its hands through nuisance regulation stopped. As Wojciech Sadurski wrote:

> All of these legislative attacks on the Tribunal [CT] only continued up to the point when PiS acquired a majority on the CT (8 out of 15)—at which time all these innovations were miraculously forgotten because they had become unnecessary (Sadurski, 2018a).

Instead, once the Tribunal could be considered friendly, the government then sent it numerous petitions to legitimate the government's various rule-of-law challenging activities. In short order, the Constitutional Tribunal in its decision K5/17 declared the statute regulating the National Judicial Council (KRS) to be unconstitutional and also nullified the law regarding the selection process for the President of the Supreme Court (K7/17). Both of these decisions opened the way for new legislation that would later gut the independence of the ordinary judiciary. On top of that, the new president of the Constitutional Tribunal, Ms. Przylebska, publicly blessed *ex cathedra* a number of laws promoted by the PiS government, laws designed to hobble the ordinary judiciary, by announcing that there were fully compatible with the separation of powers.

As this was going on in violation of repeated efforts to get the PiS government to stop, the European Commission for the first time engaged the Council, which until then had been completely silent on both the Hungarian and Polish cases. The Council broadly endorsed the actions of the Commission in a meeting on 17 May 2017, but did not take action of its own. Instead, the Council endorsed the Commission engaging in "dialogue" with the government of Poland, dialogue that had, to that point, not been notably successful.

After the destruction of the independence of the Constitutional Tribunal, the ordinary judiciary came next. In summer 2017, the government brought forward three new laws, all of

which were designed to make the courts politically dependent and all of which were passed by the PiS-dominated Parliament. One law would have allowed the KRS, the National Judicial Council which makes judicial appointments, to be captured by the PiS party through a new system for appointing its members. Another law would have fired all judges on the Supreme Court, subject to discretionary retention upon application to the Justice Minister and Public Prosecutor. Finally, the third law permitted the Justice Minister to fire without giving any reasons for their dismissal all sitting court presidents throughout the judiciary within six months of the passage of the law. In a move reminiscent of Hungary's strategy for judicial capture, this third law also lowered the judicial retirement age from 67 to 65 for men and 60 for women, thereby opening many new senior appointments to the bench that the newly renovated KRS would get to fill. But in the face of massive public demonstrations and critical responses from the European Union, President Duda vetoed the first two laws. He signed the third.

Immediately thereafter, in July 2017, European Commission issued a third Recommendation under the Rule of Law Framework, this time noting both that the constitutionality of laws could not be assured given the disabling of the Constitutional Tribunal and expressing concern about the laws on the ordinary judiciary. The two vetoed laws had been referred back to the Parliament for further consideration, indicating that the government had not given up, but instead intended to move forward with a different version of the same laws. Not only was there a systemic threat to the rule of law, the Commission concluded, but the situation had seriously deteriorated. The Polish government still refused to bend.

Protestors in the streets of Polish cities may have celebrated their victory in getting President Duda to veto two of the three offending laws in summer 2017, but the one that allowed

the court presidents to be fired with no reason and judges to be subjected to a new retirement age took effect and removed key judges from the ordinary courts. The presidents of the ordinary courts assign judges to different divisions of the courts, which could in turn guarantees that judges not favored by the government would never get politically sensitive cases. In addition, court presidents can assign and replace particular judges hearing particular cases, which means that politically dependent court presidents could ensure that cases came out as the government might want. This law also creates a hierarchy of supervision among court presidents, with lower court presidents being reviewable by the presidents of the courts above them and so on up the chain until the hierarchy stopped at the Justice Minister who could review the performance of all court presidents, providing an ultimate political check on the operation of the judiciary.

Many judges were dismissed soon after this law went into effect. But because the law on the KRS was vetoed so the old KRS was still in place, the government delayed appointments to these positions, pending a newly configured KRS to be entrusted with the task of packing them. As this occurred, nearly 10% of all of the judgeships in the country were vacant at once, waiting for PiS-friendly judges to name their replacements.

In fall 2017, President Duda emerged with draft laws to replace the two he had vetoed. Though these new draft laws were slightly less brutal than the prior laws, the effect was similar.

Under the new law on the National Judicial Council that makes appointments to the judiciary, the KRS was to be filled by judges approved by the governing party and its parliamentary majority – as before. The old members of the KRS, whose four-year terms of office were guaranteed in the Constitution, would be immediately dismissed without completing their

terms. This law might well have been deemed unconstitutional because it fired judges with constitutionally guaranteed terms of office, but with a captured Constitutional Tribunal, who could have said so?

The new law on the Supreme Court did not fire *all* of the judges, as the summer law would have done, but instead subjected all of the judges to a newly set retirement age of 65. Given the civil-service career paths of most judges in Poland, where judges advance into the more important positions only with advancing age, this new retirement age meant that nearly 40% of the Supreme Court judges would be dismissed. Of course, this was the same trick used by the Hungarians, and that the European Court of Justice had said was contrary to EU law on age discrimination, but given that the Hungarian government only had to pay compensation to the fired judges but otherwise they got to keep their captured judiciary, why not try it?

As these new laws were going through the legislative pipeline, a number of international actors chimed in that these laws spelled the destruction of independence of the Polish judiciary. Between October and December 2017, the United Nations Special Rapporteur for the Independence of Judges and Lawyers, the Consultative Council of European Judges, the Office of Democratic Institutions and Human Rights of the OSCE, the Council of Bars and Law Societies of Europe, the European Network of Councils for the Judiciary and the Council of Europe Commissioner for Human Rights condemned the new laws. In November, the European Parliament passed another resolution against Poland's assault of the judiciary and in December, the Venice Commission issued another critical report these new laws affecting the judiciary (Venice Commission, 2017), which the lower house of the Polish parliament nonetheless passed without modification on the very same day that the Venice Commission's report was published.

The Polish government didn't even appear to adjust its strategy for capturing the courts in the face of this new criticism. It barreled ahead, unchecked.

The European Commission, which had been threatening, and threatening, and threatening, all without result, by this time looked completely ineffective. Finally, on 17 December 2017, faced with a *fait accompli* as the Polish government enacted the laws that all outside observers had told them not to pass, the European Commission issued a "reasoned proposal" to the Council asking the Council to invoke Article 7(1) TEU against Poland. Never mind that Article 7(1) TEU only finds that there is a *risk* of a breach of European values, while Poland's independent judiciary would already be long gone by the time the procedure was invoked. Even invoking Article 7(1) TEU, with its four-fifths vote of Member States and two-thirds vote of the European Parliament, was a political heavy lift, given that the Council had never seen fit to publicly condemn either Hungary or Poland for failing Europe's basic constitutional commitments. Throughout the winter, through the spring and into the summer, the Council merely urged the Commission to keep talking to the government of Poland, while in the meantime, the new laws took effect. The Parliament has passed resolutions, but nothing could happen without the Council. Even if Article 7(1) could be invoked, it would simply issue a warning without sanctions of any sort. Poland clearly knew that it could get away with almost anything.

And so the Polish government tried. The new law on the Supreme Court didn't just permit the premature removal of nearly one third of the Court's judges, but it also created a new form of judicial review for previously issued final and binding judgments: the extraordinary appeal. This new procedure permits almost any decision made by the Polish courts in the last 20 years to be re-opened upon petition by either the Prosecutor General (a.k.a. the Justice Minister) or by

the Ombudsperson. A special new chamber of the Supreme Court, in which new judges appointed under the new PiS-dominated system will sit, may then decide the old case in a new way. Suddenly the legal settlement of issues in the decades since the end of communism will be up for grabs again. No legal judgment can be considered to be final any longer. And all of these new decisions about old legal questions will be made by judges who will have been appointed by agents put in place by the heavy hand of the PiS party.

New disciplinary procedures have come to the Polish courts as well. The new laws establish the position of special disciplinary officer directly appointed from among the judges in each court by the President of the Republic (himself a key PiS figure) to bring charges against judges thought guilty of disciplinary infractions. The Minister of Justice can inform the President about the need to appoint a disciplinary officer, so the process is even more overtly political than it might at first seem. Disciplinary proceedings against judges can use evidence that would be otherwise inadmissible in court in normal cases, and judges can be tried in absentia. There are no deadlines for these procedures, which means that judges charged with disciplinary offenses could be held in limbo for long periods without a resolution of the charges against them. Not surprisingly, all appeals from these disciplinary proceedings in the ordinary courts must go to another new chamber at the Supreme Court set up precisely to handle disciplinary cases against judges. It, too, will be filled with the new judges appointed with the special influence of the governing party.

To make these reforms even more political and less legal, these two new Supreme Court chambers – the one to handle cases from the past that have been newly reopened and the one to handle disciplinary actions against judges – will have lay judges as part of the mix. The lay

judges – who do not have to have any formal legal training – will be appointed by the upper chamber of the parliament (currently dominated by PiS). While many legal systems have lay judges participating in fact-finding and judgment at the trial level, it is highly unusual to introduce decision-makers without any legal training at the final stage of appeal only. The fact that these two chambers handle the politically most sensitive issues increases suspicion that the governing party is trying to isolate those cases so that they can be handled outside the law as such.

Even with the Commission's "reasoned proposal to the Council" pending to trigger Article 7(1) TEU, the Polish government was undeterred. On 3 July 2018, the 27 judges whose age suddenly precluded them from serving on the Supreme Court saw their terms ended by the new law. The most prominent of those judges, President of the Supreme Court Malgorzata Gersdorf, refused to leave office, because she thought that this law was unconstitutional. (Again, who was to say?) Nearly a dozen of the other judges supported her view and also refused to resign or petition the Justice Minister for an exception to the general rule so that they could stay on. The rest either quietly retired or asked the Justice Minister for permission to keep their jobs. The battle for the soul of the Supreme Court of Poland continues as we write.

The combined effect of all of these changes – achieved with breathtaking speed in just three years with the European Commission in hot pursuit – is that the government has captured the Constitutional Tribunal so that it now is a mouthpiece of the government. The PiS government has also has put the judges in the ordinary courts under the control of politically appointed court presidents with a draconian and arbitrary disciplinary procedure run by PiS-vetted judges. Judicial independence from the governing party is not to be tolerated. All of this is occurring in a context in which any decision from the past 20 years can be reopened on a

political petition and re-decided however the new government wants. Judicial independence in Poland is well and truly dead. The irony of this situation was not lost on the Venice Commission:

> While the Memorandum [from the Polish government to the Venice Commission explaining the rationale for the changes] speaks of the 'de-communization' of the Polish judicial system, some elements of the reform have a striking resemblance with the institutions which existed in the Soviet Union and its satellites [Venice Commission, 2017: para 89].

The European Commission, in recommending to the Council that Article 7(1) TEU be invoked, had a similarly dire assessment of the state of judicial independence in Poland:

> The Commission considers that as a result of laws adopted in 2016 and the developments following the appointment of the acting President [of the Constitutional Tribunal], the independence and legitimacy of the Constitutional Tribunal is seriously undermined and the constitutionality of Polish laws can no longer be guaranteed [European Commission, 2017: para 109].

At we write, Article 7(1) TEU still hangs in the air in the EU institutions. The Commission has urged the Council to trigger this warning and the European Parliament has indicated its readiness to support Council action. But the other Member States who sit on the Council have dragged their feet, lest they be seen to criticize the government of a fellow Member State. Article

7(1) comes with no sanctions; it is merely a warning. But the time when warnings might have made a difference is already over.

III. Why is the EU So Powerless?

Both Hungary and Poland now no longer have reliably independent judiciaries. And the pattern of government attack first on the constitutional courts and then on the ordinary judiciary was relentless in both cases. The Polish courts stood up for themselves and each other (both at the Constitutional Tribunal and at the Supreme Court) while the Hungarian courts resisted very little, but resistance mattered little in the final outcome. Autocratic governments have learned that if they strike fast and eliminate resistance quickly, they will win facts on the ground – new judges already in place willing to do the government's bidding. When that happens, the autocratic governments have won.

All of these attacks on judges in both countries occurred in plain sight, were reported in real time and were carried out on the basis of laws that were translated quickly for a broader audience. European institutions knew what was happening every step of the way; the Venice Commission performed excellent assessments of each major legal change quickly and professionally. No one paying attention could say that they did not know. The institutions of the European Union that could have sanctioned these countries simply took no effective steps to make the destruction stop.

Even now, after the judiciaries have been captured – with political officials ousting the regular judges and replacing them with politically compliant ones, with new rules and procedures

that guarantee the dominance of politics over law, and with new institutions designed to cement this partisan control for a long time – the European Union has yet to do a single thing that would save the independent judiciaries of its Member States. Why is the EU so powerless?

One reason – frequently offered by officials in the Barroso Commission – was that the European Commission simply did not have the tools to intervene. To its credit, the Barroso Commission, after its experience with Hungary, created the Rule of Law Framework to give itself the leverage to act the next time a Member State started attacking basic European values. But as we can see with Poland, the Rule of Law Framework has so far made no difference even when it has been used promptly and aggressively. The Rule of Law Framework is simply not attached to sanctions or real consequences, and so Poland has felt free to ignore it.

Another reason – in our view, more persuasive – is that Member States simply do not want to judge each other lest they be judged themselves. While the Commission and the Parliament have both been relatively active in criticizing the decline of both Hungary and Poland, the Council – where Member States are represented *as* Member States – has remained completely silent. It has neither criticized along the way nor voted to censure when called upon by other institutions to do so. When the Hungarian government was capturing the judiciary, some have claimed it was protected by the European People's Party, the party to which Fidesz belongs at European level (Kelemen, 2017). But PiS is a member of the European Reformers and Conservatives Group, a marginal party at EU level that has the British Tories as its main anchor. Not a lot of political capital there. And still the Council has so far done nothing. Member States will simply not act against other Member States on matters that look like purely internal affairs.

But perhaps an even more obvious reason is attributable to the way that the EU has been designed as a legal matter. Member States delegate competencies to the EU institutions; the EU institutions may only act within the competencies that they have been delegated. And the national constitutional structure of Member States is not one of those competencies that has been delegated to EU level. Rather the opposite: national constitutional structures are protected from EU interference by the Treaty on European Union itself:

> Article 4(2) TEU: The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. . .

Unlike federal systems in which a federal constitution is typically supreme and contains principles that must be honored down through the regional governments, the EU is definitely not a federation. Instead it operates like two parallel polities. A sharp partition divides two parallel legal systems that are effective on the same territory but that have completely separate normative origins. EU law is supreme with regard to the subjects it has been delegated; national law is supreme on the subjects it retains. Constitutional rule-of-law Member States of the EU will have values that harmonize with those at EU level making the partition between the two systems nearly invisible, but the Member States that have turned illiberal and no longer respect the division of power at national level harden the partition so that the EU cannot reach national competencies from its side of the divide.

Of course, any two legal systems operating on the same territory have inevitable overlaps that will eventually give each system some leverage over the other. Parallel systems on the same territory are inherently unstable. The EU can be rightly concerned that illiberal governments in Hungary and Poland will eventually have an effect on the quality of life and law in the EU just as these illiberal governments realize that the EU may eventually figure out how to fight back when its values are violated.

As it turns out, the European Court of Justice has developed a way to cut through the partition. The ECJ has recently held that national judiciaries are dual-use institutions. While national judiciaries have a place in national constitutional systems whose independence from EU law is guaranteed in the treaties, national judiciaries also have a central role in the operation of the EU. When those with legal claims believe that their EU law rights have been violated, they must go to the national courts, not to the EU courts, for an effective remedy. The EU courts handle a relatively small slice of EU-law cases; the vast majority go through the national courts for resolution. National judiciaries are, therefore, *also* EU judiciaries.

In its decision in *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* (C-64/16, 27 February 2018), the European Court of Justice threw out a lifeline to the other European institutions seeking to fight the destruction of judicial independence in Hungary and Poland. The case turned on a wholly different issue: the reduction in salaries of the Portuguese judiciary caused by austerity measures imposed during the Euro-crisis. Dispensing easily with the claim that a small across-the-board cut to all public employees threatened the judiciary in particular (it didn't), the ECJ then went on to explain that all Member States were obligated by Article 19(1) TEU ("Member States shall provide remedies sufficient to ensure effective legal protection in the

fields covered by Union law") to have an independent judiciary. As the Court helpfully elaborated:

> 44. 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 interventions or pressure liable to impair the independent judgment of its members and to influence their decisions . . . .

In short, national judiciaries have a role in both EU law and national law – and EU law requires them to be independent. Independence means no political control -- even from, or perhaps especially from, national leaders.

On the day before the Polish government prematurely terminated the mandate of the President of the Supreme Court of Poland and 26 other Supreme Court judges, the European Commission began an infringement action against Poland, alleging that Poland had violated its Article 19(1) TEU law obligations to maintain an independent judiciary. If the case is not settled with an effective climb-down on Poland's part, the Commission can turn to the ECJ, which can in turn use the Portuguese judges case to find against Poland. And if Poland fails to comply with the decision, the Commission can ask the Court to levy large fines for every day that Poland remains in non-compliance. That's how infringement actions work, the humble tool of the

European Commission to enforce day to day legal violation on the party of Member States. They have real consequences, unlike the warnings of Article 7(1) TEU.

With the ECJ elevating the infringement action so that it can be used to enforce constitutional-level values of the EU, the European Commission has been given a way to save the independent judiciaries in Hungary and Poland that does not rely on the courage of the Member States to challenge each other. Of course, the European Commission would have to be equally committed to pursuing Hungary as well through a similar infringement action. But perhaps if the Commission can win a strong judgment in the Polish case, it will be emboldened to try.

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