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THE EUROPEAN UNION AND THE POLISH CONSTITUTIONAL COURT REFORM: AN EXAMPLE OF CRISIS OF POWERS SEPARATION WITH «SMOKE SIGNALS» BY BRUSSELS?

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Abstract: the Law of 2016 on the Polish constitutional court leaves no doubts that the parliamentary majority lead by Law and Justice party (PiS) is not holding back and is determined to see its plan through to make sure that Polish constitutional court is finally tamed and incapacitated. The institution once recognized as powerful, efficient and independent from whatever powers that be is left at the mercy of the politicians, and unable to effectively wield its power of judicial review. Most importantly, the Law will make it impossible for the court to provide an effective check on the excesses of the parliamentary majority. The populist PiS government, which has faced criticism at home and abroad over several controversial laws since coming to power in October 2016, said in advance that it would not recognize the ruling. The law prevents the honest and proper functioning of the constitutional court, by interfering in its independence and separation from other powers, thus violating the principles of the rule of law. Legal and opposition figures have criticized the law for paralyzing the court and removing important checks on the government's power. In a leaked draft report, legal experts from the Council of Europe rights watchdog warned that the reforms undermined democracy, human rights and the rule of law in Poland. The reforms have set the government on a collision course with the European Union, which launched an unprecedented investigation in January 2016 into the reforms, which could result in punitive measures by art. 7, UE Treaty, which also provides for the loss of voting rights in the European Council, given that last October the Polish government has rejected the EU recommendations on the constitutional court and media. However, Brussels likely wants one hand to send a presence signal to the pro-European protests, but without arriving at a true «break» with Szydło's and Morawiecki's governments.

Keywords: Poland – European Union – constitutional court – separation of powers – rule of law.

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1. Introduction: European Union and judicial independence

When the European Union (EU) was funded, it was assumed that all Member States admitted as consolidated democracies would maintain their constitutional commitments. In recent years, Poland (and Hungary) have challenged this premise as elected autocratic government in those countries have captured independent institutions and threatened long-term democracy. The judiciaries of these countries have been hard hit. In this paper, I trace what has happened to the judiciaries in Poland, with particular reference to constitutional court reform of 2016, showing how first the constitutional court and then the ordinary judiciary have been brought under the control of political forces so that there is no longer a separation of law and politics. I will also explore why the EU has so far not been able to stop this process. In the end, the EU judiciary, particularly the Court of Justice, is attempting a rescue of national judiciaries, but the results are so far unclear.

At the time of the Central-Eastern EU accession in 2004, when ten new Member States entered the EU, 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[1], 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 accession of 2004, 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 democracy to semi-consolidated democracy[2], the first time a consolidated democracy has 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 Poland just barely hung onto consolidated democracy status[3]. 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 Poland? The Law and Justice party (*Prawo i Sprawiedliwość*, PiS) won an absolute majority of seats in the Chamber of Deputies in 2015, governing as a single party alone for the first time in the country's modern democratic history, while simultaneous capturing the presidency and the Senate of the Parliament. The elections could be seen ad ordinary rotations of parties away from those that had already been in power for too long[4]. But these pivotal elections, which gave full legislative and executive

[1] J.J. Linz, A. Stephan, 1996.
[2] Freedom House, 2015.
[3] Freedom House, 2018.
[4] K.L. Scheppele, 2018.

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power to a single conservative and nationalist party, spelled the beginning of the end of consolidated democracy in Central-East Europe.

Once in office, the leader of PiS, Kaczynski, 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 Kaczynski 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 Poland, 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. 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. At EU level, however, the deconsolidation of democratic governments not only posed a threat of contagion, as we have already seen with the uptake of autocratic tactis 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 to suffer, but the whole 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 EU believed it had few tools to prevent democratic backsliding because the EU was designed to protect Member States from an overreaching Union instead of protecting the Union from failing Member States. Treaty change requires unanimous agreement among the Member States; even ordinary legislation cannot be passed without qualified majority approval of the Member States. Without the Member States supporting in force what the EU does, 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.

The primary sanctions mechanism for values-based non-compliance with 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 on other fellow-traveler state supporting an offender, Article 7, TEU, has been thought impossible to use for levying sanctions. Now the EU has two. Indeed, the other legal process for ensuring the uniform enforcement of EU law, the infringement procedure, allows the EU Commission to bring Member States to the Court of Justice of European Union (CJEU) if

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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 EU values or the deconsolidation of a democratic state.

The attack on 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 no neutrally enforce the law – whether national or EU law – then it becomes impossible for those inside or outside the state to counter the autocratic state through legal means. For that reason, I will concentrate in this paper on the methods and results of the attacks on the judiciaries in Poland, focusing on the interventions that the EU attempted to make as the judiciaries were politically captured. First I will explain what happened in Poland and I will conclude by explaining why the EU has been so powerless (so far) to arrest the capture of the courts and what it could still do now.

2. Judicial independence attack in Poland

Politics in Poland (as in Hungary), had become very polarized by the time of the 2015 national elections. The Civic-Platform-led government (*Platforma Obywatelska*, PO) of the center-left in power for with years, and its popular leader, Tusk, has been drafted to Brussels to serve as the first new accession-state President of the EU Council. 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 slith their votes in the 2015 elections between Civic Platform and an upstart party called Modern Poland while the right voted for the PiS party. With only half the voters turning out, and the victorius PiS party winning only 37.5% of the vote of that participating half, PiS gained an absolute majority of seats in both chambers 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 on its way out of the office, however. 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 court). 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 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, PiS came to power with an «own goal» legal violation by Civic Platform from which PiS was determined to benefit. None of the Civic

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Platform judges had been sworn in by PiS President of the Republic 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, event thought only two had been illegally elected (19 November 2015 amendment to the Act on the constitutional court). Instead, PiS elected five of its own judges to fill all of the open seats. The constitutional court, 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[5]. But President Duda refused to publish the decisions of the court and also refused to swear in any of the Civic Platform judges. Instead, the President swore in all five of the PiS judges. The President of the constitutional court then refused to seat the three illegally elected PiS judges and the stand-off was on.

EU Commission involved quickly. In December 2015, the Commission wrote to the Polish government, asking it to follow the decisions of the constitutional court and to hold off on passing pending new legislation affecting the court until the Venice Commission could weigh in on the proposal bills. When the Polish government went ahead and passed the worrisome laws anyway without waiting for the Venice Commission report, the EU Commission invoked its Rule of Law Framework. Poland became the first target of this new in January 2016. The PiS government had only been in office for a few months, but already the EU Commission had acted decisively to bring EU oversight to bear.

The EU Commission's intervention made no difference, however. During the whole of 2016, while the constitutional court 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 court'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. Given that the court was working at less than full strength while the controversy was going on, no such two-thirds vote was possible. 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 mean 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 General Prosecutor be present for all cases of a full bench, so that the Prosecutor's absence would mean that a case could not proceed. 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.

[5] W. Sadurski, 2018.

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Throughout this legal blitz, EU institutions were active in criticizing these developments. In March, an opinion of the Venice Commission condemned the first major law restricting the constitutional court's functioning[6]. In April, the EU Parliament passed a resolution supporting the decisions of the Constitutional Tribunal against the government[7]. Emboldened by this EU 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 court as binding. In the meantime, the EU Commission met with the Polish government on numerous occasions to persuade it to end the stand-off and follow the court'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[8]. 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 court further (2 August 2016 Act on the constitutional court). The EU Parliament adopted another critical resolution in September; the Venice Commission produced another critical report on the new law restricting the constitutional court in October[9].

The constitutional court's stand-off with the government ended with the close of 2016. In December 2016, the term of the President of the court, Rzeplinski, came to is 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. EU institutions were again active through this process. Just as President Rzeplinski's term ended, the EU Commission adopted a second Recommendation asking the Polish government to delay the process for selecting his successor. But one of the legally elected PiS judges, Przylebska, was made *interim* President of the court by a hastily passed statue, even though the pre-existing rules of the court specified that the sitting vice-president should preside over the selection of the next President. *Interim* President Przylebska was almost immediately then called for the election of the President of the court in a highly questionable process over which she presided ad from which she emerged as the new President herself. Her election involved

[6] Venice Commission, Poland: Opinion on Amendments to the Act of 25 June 2015 on the constitutional court of Poland (CDL-ad(2016)001.
[7] Venice Commission, Poland: Opinion on Amendments to the Act of 25 June 2015 on the constitutional court of Poland [CDL-ad(2016)001] and Poland: Opinion on the Act on the constitutional court [CDL-ad (2016)026].
[8] Venice Commission, Poland: Opinion on Amendments to the Act of 25 June 2015 on the constitutional court of Poland (CDL-ad(2016)001.
[9] Venice Commission, Poland: Opinion on Amendments to the Act of 25 June 2015 on the constitutional court of Poland [CDL-ad(2016)001] and Poland: Opinion on the Act on the constitutional court [CDL-ad (2016)026].

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the violation of black-letter rules about how a new President of the constitutional court should be selected (since she held only one vote of the other judges instead of two as required by law). And her election resulted from an illegally constituted vote. The *interim* President simply did not 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 PiS judges to the bench just in time to vote for her. When these tricks, she narrowly won the election over which she presided to become President of the court. Several new vacancies on the court after that were engineered by her through 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 move 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 court, government's attempts to tie the court's hands through nuisance regulation stopped. These legislative attacks on the court only continued up to the point when PiS acquired a majority on the constitutional court – at which time all these innovations were miraculously forgotten because they had become unnecessary[10]. Instead, once the court could be considerably friendly, the government then sent it numerous petitions to legitimate the government's various rule-of-law challenging activities. In short order, the constitutional court declared the statute regulating the National Judicial Council (KRS) to be unconstitutional[11] and also nullified the law regarding the selection process for the President of the supreme court[12]. Both of these decisions opened the way for the new legislation that would later gut the independence of the ordinary judiciary. On top of that, Przylebska, as the new President of the constitutional court, publicly blessed *ex cathedra* a number of laws promoted by the PiS government, laws designed to hobble the ordinary judiciary. She announced, with no case before her, that these laws 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 EU Commission for the first time engaged the EU Council, which until then had been completely silent on both the Hungarian and Polish cases. The General Affairs Council broadly endorsed the actions of the Commission with regard to Poland in a meeting on May 17, 2017, but did not take action of its own. Instead, the EU 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 court[13], 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

[10] W. Sadurski, 2018.
[11] Decision K5/17.
[12] Decision K7/17.
[13] T.T. Koncewicz, 2018, 116-173.

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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. 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 from 67 to 65 for men and 60 for women for all courts below the supreme court, thereby opening many new senior appointment 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 EU, President Duda vetoed the first two laws and signed just the third.

Immediately thereafter, in July 2017, EU Commission issued a third Recommendation under the Rule of Law Framework, this time both noting that the constitutionality of laws could not be assured given the disabling of the constitutional court 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 different versions of the same laws. Not only was there a systemic thereat to the rule of law, the Commission concluded, but the situation had seriously deteriorated. The Polish government still refused to cave in.

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

Under the new law on the Polish KRS 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 from positions that had constitutionally guaranteed terms of office but with a captured constitutional court, 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 Hungarian government, and that the CJEU had said was

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contrary to EU law on age discrimination, but given that – according ECHR judgment[14] – the Hungarian government only had to pay compensation to the fired judges but otherwise 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, some no governmental organization on human rights and independence of judges[15], condemned the new laws. In November, the EU Parliament passed another resolution against Poland's assault of the judiciary and in December, the Venice Commission issued another critical report about these new laws affecting the judiciary[16], which the Polish Chamber of Deputies 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 EU Commission, which had been repeatedly threatening, all without result, by that time looked completely ineffective. Finally, on December 17, 2017, faced with a fait accompli as the Polish government enacted the laws that all outside observers had told them not to pass, the EU Commission issued a «reasoned proposal» to the EU Council asking the EU 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 EU 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 EU Parliament, was a political heavy lift, given that the EU 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 EU 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 can happen without the EU Council. Even if Article 7(1), TEU, 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[17].

And so one Polish government tried. The new law on the supreme court did not just permit the premature removal of nearly one third of the court's judges, but it also

[14] *Baka v. Hungary*, 20261/12, 23 June 2016. See K. Katalin, 2016, 827-830; S. Marinai, 2016, 512-519; R. Romboli, 2016, 509-512; V. Volpe, 2015, 43-51; C. Bologna, 2014, 750-753.
[15] 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.
[16] Venice Commission, 2017, Poland: Opinion on the Draft Act Amending the Act on the National Council of the Judiciary; on the Draft Act Amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organization of Ordinary Courts [CDL-AD (2017)031].
[17] M. Taborowski, 2018, 238-242.

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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 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 grabs again. No legal judgment could 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 for judges on the Polish courts have been enacted 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, a key PiS figure himself, 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 seem at first. 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 of time 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 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 do 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 July 3, 2018, the 27 judges whose are 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, Gersdorf, refused to leave office, because she thought that this law was unconstitutional. 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

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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. Lastly, the Polish Parliament passed a law that would allow a new President of the supreme court to be elected more quickly.

The combined effect of all of these changes – achieved with breathtaking speed in just three years with the EU Commission in hot pursuit – is that the government has captured the constitutional court so that it now is a mouthpiece of the government. The PiS government has also 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 decision from the past 20 years could be reopened on a political petition and re-decided as the new government dictates. Judicial independence in Poland is well and truly dead. If the Memorandum from the Polish government explaining the rationale for the change, speak 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[18].

The EU Commission, in recommending to the EU Council that Article 7(1), TEU, 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 court, the independence and legitimacy of the constitutional court is seriously undetermined and the constitutionality of Polish laws can no longer be guaranteed[19].

Lastly and finally, the 2018, 24 September, the EU Commission decided to refer formally Poland to the CJEU due to the violations of the principle of judicial independence created by the new Polish Law on the supreme court, and to ask the Court of Justice to order *interim* measures until it has issued a judgment on the case. The EU Commission maintains that the Polish law on the supreme court is incompatible with EU law as it undermines the principle of judicial independence, including the irremovability of judges, and thereby Poland fails to fulfill its obligations under Article 19(1), TEU, read in connection with Article 47 of the Charter of Fundamental Rights of the EU (CFREU). The Commission has therefore moved to the next stage of the infringement procedure, deciding to refer the case to the Court of Justice of the EU. With its referral, the Commission has also decided to ask the Court of Justice to order *interim* measures, restoring Poland's supreme court to its situation before 3 April 2018, when the contested new laws were adopted. Moreover, the Commission has decided to request an expedited procedure at the Court of Justice, to obtain a final judgment as soon as possible.

[18] Venice Commission, 2017, *supra* note 14.
[19] EU Commission, 2017, Reasoned proposal in accordance with Article 7(1), TEU, regarding the rule of law in Poland, Brussels, 20 December 2017/-360 (APP), para. 109.

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The implementation of the contested retirement regime for supreme court judges in Poland is being accelerated and is creating a risk of serious and irreparable damage to judicial independence in Poland, and therefore of the EU legal order. The independence of national courts and tribunals is essential for the functioning of judicial cooperation between EU Member States, and particularly for the preliminary ruling mechanism under Article 267, TEU.

3. The powerlessness of European Union by «smoke signals»

Apparently Poland (and Hungary) now no longer have reliably independent judiciaries. The pattern of government capture first of the constitutional courts and then of the ordinary judiciaries was relentless in both cases. The Polish courts stood up for themselves and each other (both at the constitutional court and at the supreme court). Resistance mattered little in the final outcome in any event. 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 and there is little that outsiders can do to dislodge the new judges or turn the situation around.

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. Officials at the EU 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 EU institutions 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 being enacted on a regular basis that guarantee the dominance of politics over law, and with newly redesigned judicial institutions designed to cement this partisan control for a long time – the EU 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 was that the EU Commission simply did not have the tools to intervene. To its credit, the former 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 EU 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 not attached to sanctions or real consequences, and so Poland has felt free to ignore it.

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Another reason 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 EU 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. Moreover if the Hungarian Fidesz Party was protected by the European People's Party, the party to which Fidesz belongs at EU level[20], the Polish PiS is just 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 EU Council has so far done nothing. Member States will simply not act against other Member States on matters that look like purely internal affairs. No serious sanctions can be issued as long as the EU Council remains uninvolved.

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 TEU itself[21].

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 operated 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 system of checks and balances at national level harden the partition so that the EU cannot reach national competencies from its side of the divide.

However, 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 when their underlying values clash. 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 two to fight back when its values are violated.

[20] R.D. Kelemen, 2017.

[21] 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 […]».

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As it turns out, the CJEU started to cut through the partition. The CJEU has recently held that national independence from EU law is guaranteed in the treaties, national judiciaries also have a central role in the operation of the EU and must be bound by EU law. The EU courts handle a relatively small slice of EU-law case; the vast majority go through the national courts for resolution. When those with legal claims believe that their EU law rights have been violated, 99% of the time they must go to the national courts, not to the EU courts, for an effective remedy. National judiciaries are, therefore, also EU judiciaries.

In its decision in *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*, the CJEU threw out a lifeline to the other EU institutions seeking to fight the destruction of judicial independence in Poland (and in Hungary). The case before the CJEU 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 did not), the CJEU then went on to explain that all Member States were obligated by Article 19(1), TEU, to have an independent judiciary[22], as the court helpfully elaborated[23].

All national courts in the EU must be independent in this way because national judiciaries have a role in both EU law and national law. 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 EU 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 CJEU, 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 EU Commission to police day to day legal violation on the part of Member States. Infringement actions have real consequences, unlike the warnings of Article 7(1), TEU. And while infringement actions have not so far been used effectively to challenge autocratic consolidation of a Member State, the CJEU has strongly hinted that it would be open to such a challenge.

With the CJEU elevating the infringement action so that it can be used to enforce constitutional-level values of the EU, the EU Commission has been given a way to save

[22] Article 19(1), TEU: «Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law».

[23] «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» (C-64/16, *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*, February, 27, 2018, para. 44).

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independent judiciaries in Poland that does not rely on the courage of the Member States to challenge each other. Of course, the EU Commission would have to be courageous to challenge Poland. But perhaps if the Commission can win a strong judgment in the Polish case, it will be emboldened to try.

Thus it is likely that Brussels wants one hand send a presence signal to the pro-EU protests, but without arriving at a true 'break' with Szydło's and Morawiecki's governments.

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