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# Court of Justice of the European Union Rules Against Polish Law on the Supreme Court

by Ben Phillips

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The Europe Union (EU) is embroiled in an internal struggle over the rule of law and preserving its democratic rights and values against creeping authoritarianism. The Polish legislature passed a law that lowered the retirement age of Supreme Court judges to remove current judges and pack the courts with judges that are loyal to the Law and Justice Party. In *Commission v. Poland*, case C619/18 (6/24/19), Court of Justice of the European Union (CJEU) ruled that the Polish Law on the Supreme Court (“Law on the Supreme Court”) was contrary to EU law.[1] The CJEU addressed Poland’s practice of packing courts with loyal political appointees and demonstrated how this subverts judiciary independence.[2] This decision is a major development in combating the trend of authoritarian regimes using legal methods to undermine democratic checks and balances.

The Law on the Supreme Court, passed on April 3, 2018, forced Supreme Court judges to retire at the age of sixty-five, unless they are granted an extension by the President. The CJEU struck down this law on June 24, 2019 for violating EU law on rule of law and independent judiciaries.[3] The CJEU is the constitutional supranational court of the EU, and they are often trying to balance protecting the uniformity of EU law and respecting the autonomy of the European member states. Here, the Court held that the Polish law had no legitimate government interest and violated the provisions of the Treaty on European Union (TEU).[4] The CJEU specifically pointed to the principles of independent judiciaries and the irremovability of judges. The EU is currently embroiled in what has been called the “rule of law crisis.”[5] Prior to this case being decided by the CJEU, the European Commission referred the matter of the breakdown in the rule of law in Hungary, Poland, and Romania to the Council of Europe.[6] The two major regimes that have brought about this crisis are the Law and Justice Party in Poland and Prime

Minister Victor Orban’s Fidesz Party in Hungary. These two authoritarian regimes denounce the European judiciary for undue interference with national politics and espouse a form of unchecked nationalism.[7] This CJEU case on Poland’s attempted court packing is part of a larger narrative stemming from the “rule of law crisis” and challenges to the principles of democratic governance, rule of law, and human rights law enshrined in the Treaty on the Functioning of the European Union and in the United Nations Declaration of Human Rights.[8]

At first glance, the issue of court packing may not stand out as a democratic or human rights issue. Many countries have packed courts without human rights implications. However, Hungary and Poland are packing their courts to undermine accountability and judicial independence.[9] The right to effective remedy and the right to a fair trial before independent national judiciaries are specifically protected by Articles eight and ten of the United Nations Declaration of Human Rights.[10] The right to effective remedy and fair trial are also protected under Article 47 of the Charter of Fundamental Rights of the European Union.[11] The right to a fair trial and judicial independence are critical to protecting individual rights, and these rights are also imperative for enforcing checks on other human rights abuses as well.

These authoritarian regimes use legal methods to undermine their own institutions and advance their illiberal law and policies. There are concerted efforts in both Hungary and Poland to dismantle democratic protections.[12] These regimes did not gain power all at once. Instead, their leaders and political groups have slowly and strategically subverted their country’s democratic institutions and processes in order to entrench themselves in power and destroy the checks and balances within their systems.[13] These regimes

focused on compromising the impartiality of the judiciary, replacing judges and packing courts, and increasing political appointments of loyal judges.[14] The compromised impartiality of the Polish and Hungarian judiciaries have paved the way for attacks on reporters, detaining asylum seekers and immigrants in Hungary, and restricting the rights of Civil Society Organizations and Human Rights organizations to gather freely in Poland.[15] These largely unchecked actions are possible, in part, thanks to the Polish and Hungarian regimes sabotage of their democratic institutions. These actions are the backdrop for the CJEU decision in *Commission v. Poland*.

The CJEU struck down the Law on the Supreme Court because it violated EU Law. Specifically, the CJEU cited to Article 19(1) of the TEU, “Member States shall provide remedies sufficient to ensure effective legal protection” of EU law and Article 47 of the Charter of Fundamental Rights of the European Union, the right to effective remedy and a fair trial.[16] The Court argued that Poland’s compulsory retirement of judges on the Supreme Court undermined the independence and effectiveness of the judiciary, in violation of the fact that domestic courts are also EU courts and must monitor the effective implementation of EU law.[17] The Court further argued that the law compromised the judges’ impartiality because the President had complete discretion to extend (or not extend) judicial terms past the retirement age.[18] The Court ruled that court packing and eroding judicial independence violated the principle of rule of law espoused in Article 2 of the TEU, which lays out the fundamental principles of the EU and its member states.[19] This ruling shows that the CJEU and laws of the EU can still be relied on to deal with the rule of law crisis in Europe.

Since the CJEU’s judgement, the judges removed by the Law on the Supreme Court have been reinstated.[20] If the CJEU can have such effect in Poland, it can also monitor other laws and policies that undermine judicial independence in Romania and other European countries edging towards illiberal policies and authoritarianism.[21] These governments intentionally compromise their own judiciaries to silence political opposition and circumvent the enforcement of other human rights obligations. However, the effective use of the CJEU and other EU institutions is an important strategy to curb the spread and empowerment of authoritarian regimes. Most importantly, it demonstrates

that these countries are still able to be held accountable and cannot completely evade enforcement. Outside of actual changes caused by the CJEU decision, it also represents an ideological demonstration that the EU will take active measures to stand against policies and laws meant to undermine judicial independence and other democratic values. The intervention of the EU and the CJEU is a concrete step toward combatting undemocratic policies and laws that limit access to an independent judiciary and a fair trial.

The CJEU decision on Poland’s Law on the Supreme Court is an important moment in addressing the rule of law crisis in Europe. The EU must apply and replicate these processes in the other member states in the EU that are employing similar practices to threaten the independence of their judiciaries. This is imperative to combat the erosion of judicial independence and maintain checks on authoritarian executive and legislative powers. The right to a fair trial and independent judiciary are vital human rights because they protect the rule of law and ensure that other obligations are being enforced.

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1 Court of Justice of the European Union, Press Release No. 81/19: Case C-619/18, *Commission v. Poland* (June 24, 2019).

2 Id.

3 Id.

4 Id.

5 Id; Daniel Hegedüs, No End in Sight for the EU’s Democracy and Rule of Law Crisis, THE GERMAN MARSHALL FUND OF THE UNITED STATES (March 11, 2019), <http://www.gmfus.org/blog/2019/03/11/no-end-sight-eus-democracy-and-rule-law-crisis>.

6 European Commission, Rule of Law: European Commission acts to defend judicial independence in Poland, [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_17\\_5367](https://ec.europa.eu/commission/presscorner/detail/en/IP_17_5367).

7 Phillippe Dam, EU foot-dragging puts rule of law at risk in Hungary, Poland, HUMAN RIGHTS WATCH (Dec. 10, 2018), <https://www.hrw.org/news/2018/12/10/eu-foot-dragging-puts-rule-law-risk-hungary-poland#>.

8 Christian Davies, The battle for the rule of law in Poland will have consequences across Europe, Prospect Mag. (June 27, 2019), <https://www.prospectmagazine.co.uk/world/the-battle-for-the-rule-of-law-in-poland-will-have-consequences-across-europe>; Treaty on European Union, Oct. 26, 2012, O.J. (C 326); Universal Declaration of Human Rights, G.A. Res 217 A (Dec. 10, 1948).

9 Dam, *supra* note 7.

10 Universal Declaration of Human Rights, *supra* note 8.

11 EU Charter of Fundamental Rights art. 47, Dec. 14, 2007, O.J. (C 303).

12 Krisztina Than, Hungary plans new administrative court, rejects rule of law concerns, REUTERS (Sept. 20, 2018), <https://www.reuters.com/article/us-hungary-courts-minister/hungary->

plans-new-administrative-courts-rejects-rule-of-law-concerns-idUSKCN1M0178; Poland's ruling Law and Justice party is doing lasting damage, *THE ECONOMIST* (Apr. 21, 2018), <https://www.economist.com/europe/2018/04/21/polands-ruling-law-and-justice-party-is-doing-lasting-damage>

13 Dam, *supra* note 7; Leonid Bershidsky, The EU is Winning Its Rule-of-Law Challenges, *BLOOMBERG OPINION* (June 5, 2019), <https://www.bloomberg.com/opinion/articles/2019-06-05/eu-successfully-stands-up-for-courts-in-hungary-poland-romania>

14 Bershidsky, *supra* note 13.

15 Roy Greenslade, Three journalists beaten and detained by Hungarian border police, *THE GUARDIAN* (Sept. 17, 2015), <https://www.theguardian.com/media/greenslade/2015/sep/17/three-journalists-beaten-and-detained-by-hungarian-border-police>; Global Detention Project, Hungary Immigration Detention, <https://www.globaldetentionproject.org/countries/europe/hungary>; Civic Solidarity, Polish authorities reduce the space for the activities of NGOs including human rights organizations in the country, <https://www.civicsolidarity.org/article/1545/polish-authorities-reduce-space-activities-ngos-including-human-rights-organizations>.

16 Treaty on European Union, *supra* note 8 art. 19; EU Charter of Fundamental Rights, *supra* note 11.

17 Associação Sindical dos Juizes Portugueses v. Tribunal de Contas, C-64/16 (Supreme Administrative Court, Portugal, 2018).

18 Court of Justice of the European Union, *supra* note 1.

19 Treaty on European Union, *supra* note 8 art. 2.

20 Poland reinstates Supreme Court judges following EU ruling, *BBC NEWS* (Dec. 17, 2018), <https://www.bbc.com/news/world-europe-46600425>.

21 Jan Strupczewski, EU threatens legal steps against Romania over rule of law, *REUTERS* (May 13, 2019), <https://www.reuters.com/article/us-eu-romania/eu-threatens-legal-steps-against-romania-over-rule-of-law-idUSKCN1S1DL>.