

Poland’s Rule of Law Snowball: The Increasing Severity of the Rift Between Poland and the European Union

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TABLE OF CONTENTS

I.	INTRODUCTION	418
II.	CASE BACKGROUND & PRIOR LAW	423
III.	THE POLITICAL BACKDROP IN POLAND: SETTING THE STAGE FOR CONTROVERSY	423
IV.	POLAND’S LAW ON THE SUPREME COURT OF 8 DECEMBER 2017	428
V.	APPLICABLE EU LAW	431
VI.	THE CASE: WHEN LEGAL HEADS COLLIDE	433
VII.	PUNCH, COUNTERPUNCH: THE POLISH CONSTITUTIONAL TRIBUNAL RESPONDS	437
VIII.	CONCLUSION	440

The European Union (EU) faces a unique legal dilemma. As a supranational legislative and judicial authority, the EU asserts the primacy of its laws over the national laws of member states.¹ In the Union’s view, all EU law has been validly adopted by member states who voluntarily and willfully acceded to the EU’s formational treaties.² Without legal primacy, member states would be allowed to “unilaterally withdraw from obligations previously

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1. Monica Claes, *The Validity and Primacy of EU Law and the ‘Cooperative Relationship’ Between National Constitutional Courts and the Court of Justice of the European Union*, 23 MAASTRICHT J. OF EUR. & COMPAR. L. 151, 154 (2016).

2. *Id.*

assumed in common agreement” and create inequality amongst members of the bloc.³

On the other hand, member states hold a compelling interest to control the laws applicable to their respective sovereign territories.⁴ Member states have been wary of complete submission to the EU’s professed legal supremacy and actively hold that EU law is only applicable if it doesn’t violate a core piece of national constitutional law.⁵

This duality between EU and state interests, similar to conflicting interests of American federal and state laws, has inevitably led to conflicts over governing rules of law and where the bounds of EU law extend. Recently, Poland has challenged the reach of EU law into the Polish nation judicial structure. Although the European Court of Justice intervened with its decision in *Commission v. Poland*, the saga of the Poland’s rule of law debate was not ready to end.

I. INTRODUCTION

After two world wars and more than 40 years of political chaos, socio-economic ruination, and ideological insurgency, post-war Europe was left in tatters.⁶ The continental balance of power tipped in favor of the allied powers in World War II, but the immediacy of the Cold War’s onset set a stage poised for what many believed would be a nuclear-powered World War III.⁷ From this void, however, came the beginning ideologies of a future European identity. There are many theories on where the metaphorical phoenix arose: a sincere fear of “-isms, notably fascism and communism” led to the creation of “a realm beyond ideological division”; a shift towards Central European integration by “neoliberal successors” ready to implement their idealized international organizations; or a more innately human recognition of the potential for capital growth through socio-economic cooperation.⁸

No single one of these theories led to the creation of the European Union (EU). The EU, as we see it today, grew out of myriad worries, wants, ideologies, and policies that were combined to build a foundation for international cooperation. The 1951 Treaty Establishing the European

3. *Id.*

4. *See id.* at 154–55.

5. *Id.* at 155.

6. Jonathan White, *Europeanising Ideologies: Understanding the EU’s complex relationship with ‘isms’*, LONDON SCH. OF ECON. (Sept. 20, 2020), <https://blogs.lse.ac.uk/europpblog/2020/09/02/europeanising-ideologies-understanding-the-eus-complex-relationship-with-isms/> [https://perma.cc/PD6E-RBCK].

7. *Id.*

8. *Id.*

Coal and Steel Community (ECSC), the original predecessor to the EU, distilled and blended the ideas of its founding member states to establish a community “based on a common market, common objectives, and common institutions.”⁹ At first it grew out of a largely uncontroversial economic purpose with a defined set of functions to grow European integration on a quantifiable, containable scale.¹⁰ At its core, the ECSC was to oversee and contribute to the “development of employment and the improvement of the standard of living in the participating countries through the institution.”¹¹ Established only a few years later in 1957, the European Economic Community (EEC), held similar sentiments in regards to both the specific purpose of advancing economic integration and in proving the growth of integration through new areas of coordinated common action.¹²

However, the defined functions of these proto-unions were accompanied by aspirational preambles that eventually contributed to the expansion and evolution of the communities’ power to control an ever-integrating Europe.¹³ Once the ECSC and EEC merged to form the European Communities in 1965, the bloc gradually gained footholds in the European economy and started establishing uniform practices of economic policy.¹⁴ Infrastructural Europeanism—the development of cross-European infrastructures and a single European market—became the forward vision of the Communities and, later, the European Commission.¹⁵

This growth into a role as uniform policymaker came much to the chagrin of some of Europe’s more outspoken political figures, namely France’s President Charles De Gaulle. In one of the first known instances of Euroscepticism, De Gaulle’s was overtly hesitant towards establishing

9. Treaty Establishing the European Coal and Steel Community, art. 1, Apr. 18, 1951, 261 U.N.T.S. 140 [hereinafter “ECSC Treaty”].

10. Joris Larik, *From Specialty to Constitutional Sense of Purpose: On the Changing Role of the Objectives of the European Union*, 63 INT’L & COMP. L.Q. 935, 941 (2014) (discussing the change in objectives of the European Union).

11. ECSC Treaty, *supra* note 9, art. 2.

12. Larik, *supra* note 10, at 942–43.

13. ECSC Treaty, *supra* note 9, at pmb1; Treaty Establishing the European Economic Community, pmb1, Mar. 25, 1957, 298 U.N.T.S. 3 [hereinafter ECC Treaty].

14. *Merger Treaty*, EUROPEAN UNION, <https://www.europarl.europa.eu/about-parliament/en/in-the-past/the-parliament-and-the-treaties/merger-treaty> [<https://perma.cc/3VFL-DPHP>]; Ina Sokolska, *The First Treaties*, EUROPEAN UNION, (May 2022), <https://www.europarl.europa.eu/factsheets/en/sheet/1/the-first-treaties> [<https://perma.cc/YE8L-FB6M>].

15. John Szabo & Marton Fabok, *Infrastructures and state-building: Comparing the energy politics of the European Commission with the governments of Hungary and Poland*, 138 ENERGY POL’Y 1, 3 (2020).

a supranational governing authority, which he feared the ECSC and ECC were becoming.¹⁶ Fueled by deeply rooted nationalism, De Gaulle “despised any schemes for international order that were not based on coherent nation-states.”¹⁷ His idea of a loose democratic union of European nations was primarily built to ensure that French sovereignty would not be stripped away in any capacity.¹⁸ But it also elicited a deep distrust of an integrated European political and economic state that would never be able to meet the needs of a diverse European community.¹⁹ Decades later, the central tenets of De Gaulle’s ideas on sovereignty are more applicable to the European Union than ever before.²⁰

The scope of action of the European Communities grew and its governance significantly expanded.²¹ Continuing revision of the ECSC and EEC treaties provided the Communities with more authority.²² In time, the now-EU actively cultivated an image as the European continent’s central guarantor of civil democratic rule.²³ The enhancement of its functions and regulatory power over nearly 50 years grew the originally loose economic cooperation unions into a highly structured web of executive, legislative, and judicial institutions.²⁴ The eventual formation of the EU through the 1990 Treaty of Rome finally cemented De Gaulle’s worst nightmare: a monumental supranational governing body.²⁵ Despite its pitfalls, the EU has both kept relative peace on the European continent and greatly enhanced the cultural, political, and economic cooperation between member states.²⁶

While De Gaulle’s overt disdain for Europe’s structural centralization may not be as palpable today, Poland has grown in notable Eurosceptic

16. Adrian Waters, *Charles De Gaulle and his “Europe of Nations”—Theory and Practice*, INST. FOR A GREATER EUROPE (June 25, 2019), <https://institutegreatereurope.com/charles-de-gaulle-and-his-europe-of-nations-theory-and-practice/> [<https://perma.cc/L6E9-F4GG>].

17. *Id.*

18. *See id.*

19. *See id.*

20. *Id.*

21. *See Larik, supra* note 10, at 935.

22. *Id.* at 942–44.

23. *See id.* at 961–62.

24. *Id.*

25. *See supra* note 16; *see also* Andrew Moravcsik, *De Gaulle Between Grain and Grandeur: The Political Economy of French EC Policy, 1958–1970 (Part 1)*, 2 J. COLD WAR STUD. 3 (2000).

26. *See* Alan V. Deardoff, *EU Expansion and EU Growth* (2002) (presentation submitted to the University of Michigan) (on file with author), <http://fordschool.umich.edu/rsie/workingpapers/Papers476-500/r487.pdf> [<https://perma.cc/RAX5-A6AP>].

stature in the face of the EU's application of modern European democracy.²⁷ In the years preceding their return to power in 2015, the National Law and Justice Party, better known as "PiS", envisioned drastic changes to Polish law to take it from the hands of "old communist elites" who had "bound the hands of the [post-Communist] reformers."²⁸ This rhetoric continued after PiS's sweep into office and quickly amounted to action through major changes to the structure of Poland's governing institutions, especially apparent in the controversial changes to the country's judiciary.²⁹ From 2015 to 2017, Poland burst onto the scene as a non-traditional challenger (i.e., not the UK, Germany, or France) to the invasive reach of the EU's governmental superstructure and became a central focus of the EU's interaction with its Eastern European members.³⁰

Western European media characterized the growing tensions as a dividing Europe, split between the modernity of Western European democracy and the antiquity of Eastern European authoritarianism.³¹ The media criticized the EU's perceived lack of affirmative response through the rather myopic lenses of commentators who bemoaned the lack of active mobilization against democratic backsliding as an affront to the very fabric of the Union itself.³² These commentators accused the EU of tying "the European Commission's hands when it comes to conditioning EU funding upon respect for the rule of law" and allowing Poland to "consolidate [its] autocratic power with a little consequences."³³

Additionally, over-publicized coverage of far-right protests in Warsaw failed to show reciprocal anti-fascist demonstrations across the rest of

27. See Robert Csehi and Edit Zgut, *'We won't let Brussels dictate us': Eurosceptic populism in Hungary and Poland*, 22 EUR. POL. SOC'Y 53 (2020), <https://doi.org/10.1080/23745118.2020.1717064> [<https://perma.cc/X4W2-FQVP>].

28. *Id.* at 8.

29. *Id.* at 8–9.

30. See Phillips Nieto, *Is Poland Eurosceptic?*, LE J. INT'L (June 18, 2020), <http://www.lejournalinternational.info/en/la-pologne-est-elle-vraiment-eurosceptique/> [<https://perma.cc/8A54-TKH8>].

31. *Id.*

32. R. Kelemen & Jacob Stroll, *The EU is undermining its democracies while funding its autocracies*, POLITICO (May 13, 2020), <https://www.politico.eu/article/the-eu-is-undermining-its-democracies-while-funding-its-autocracies-coronavirus-covid19-rule-of-law/> [<https://perma.cc/2VKV-NYKD>].

33. Philippe Dam, *EU Favors Autocrats over Values*, HUM. RTS. WATCH (Dec. 11, 2020), <https://www.hrw.org/news/2020/12/11/eu-favors-autocrats-over-values> [<https://perma.cc/VS4J-G9D4>].

Poland.³⁴ This coverage failed—and continues to fail—to understand the immense complexity of multifaceted circumstances that, in some ways, disproportionately affect Poland.³⁵ Consequently, the EU found itself under increasing pressure as outspoken criticism grew from both Western media and influential Western heads of state alike.³⁶

In reality, the EU had already intervened in rule of law debates through affirmative legal action against Eastern European members through the European Commission (hereinafter “EC”).³⁷ The EC, also called the “guardian of the treaties,” has become the most active EU institution supervising “domestic policy application” and national compliance with EU law.³⁸ The EC is comprised of one national representative from each EU member state and is endowed with both the legal authority to “promote[] the general interest of the Union” and the power to take action against members states who violate EU laws and treaties.³⁹ Poland’s drastic changes to its judiciary have drawn recent unwanted attention from the EC; the EC has responded by employing modern interpretations of the Treaty on the Functioning of the European Union (TFEU), has pitted itself against Poland’s government as a guarantor of “the unity of European legal order.”⁴⁰

This note will analyze one of the most recent bouts between the EC and Poland in their ongoing struggle over the image of European democracy, rule of law, and national sovereignty: the European Court of Justice’s June 2021 decision in *Commission v. Poland*. The EU’s conceptions of western democracy and rule of law, including strict adherence to the impartiality of a judicial branch, created the EC’s legal theory for taking a stand against

34. Nieto, *supra* note 30.

35. See Marek Cichocki, *How the Changes in Poland Are Changing Europe*, ASPEN REVIEW, Mar. 15, 2017, <https://www.aspen.review/article/2017/how-the-changes-in-poland-are-changing-europe/> [<https://perma.cc/RLQ7-V7RJ>].

36. See Nieto, *supra* note 30; see also Dam, *supra* note 33.

37. See CHRISTIAN ADAM ET AL., JUDICIAL CONTROL OF THE GUARDIAN—EXPLAINING PATTERNS OF GOVERNMENTAL ANNULMENT LITIGATION AGAINST THE EUROPEAN COMMISSION 2 (2018), https://refubium.fu-berlin.de/bitstream/handle/fub188/25699/Adam_Judicial_2018.pdf?sequence=1&isAllowed=y [<https://perma.cc/5M5H-RXSD>].

38. *Id.* at 7.

39. *European Commission*, EUROPEAN UNION, https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/institutions-and-bodies-profiles/european-commission_en [<https://perma.cc/3BAB-ZJPA>].

40. Jessica Parker, *Polish PM Accuses EU of Blackmail as Row Over Rule of Law Escalates*, BBC (Oct. 19, 2021), <https://www.bbc.com/news/world-europe-58955375> [<https://perma.cc/YLX6-AAKL>]. See Sabine Siebold & Alicja Ptak, ‘You are Playing with Fire’: EU Faces Crisis Over Polish Court Ruling, REUTERS (Oct. 8, 2021), <https://www.reuters.com/world/europe/polish-court-ruling-plunges-eu-into-new-crisis-eu-ministers-say-2021-10-08/> [<https://perma.cc/RV7P-42PS>] [hereinafter Siebold & Ptak].

Poland's autocratic government.⁴¹ However, Poland's ultimate sovereignty, brought to heightened attention thanks to its far-right leadership, stands in stark opposition to the perceived overreach of the EU's regulatory authority.⁴²

Part II starts by addressing the building tension between the European Commission and Poland over the last decade and how their legal relationship has been bogged in extensive litigation over disputes regarding Poland's attempted judicial system overhaul. This sets the stage for Part III's discussion of the case's facts and the ultimate ruling by the European Court of Justice in favor of the EC. Part IV will analyze the reaction in Poland to the ECJ's decision and why the EC's actions might serve an antithetical purpose in the ongoing rule of law struggle.

II. CASE BACKGROUND & PRIOR LAW

To fully discuss the ECJ's decision and reasoning in *Commission v. Poland*, this note must first establish the contextual backdrop behind how Poland invoked the ire of the EC, how and why the Polish law establishing disciplinary chambers for high-level judicial officials came under the EC's scrutiny, and what EU laws stand in opposition to the controversial Polish law.

III. THE POLITICAL BACKDROP IN POLAND: SETTING THE STAGE FOR CONTROVERSY

Poland's Supreme Court is a constitutionally dictated tribunal whose members are nominated by the lower house of Poland's bicameral legislature, the Sejm.⁴³ Traditionally, Polish law dictated that judges were able to sit in tenure until the age of 70, at which time they had to retire.⁴⁴

41. See Case C-791/19, *Comm'n v. Poland*, ECLI:EU:C:2021:596, ¶ 1 (July 15, 2021).

42. See Siebold & Ptak, *supra* note 40.

43. See *Poland*, NETWORK OF THE PRESIDENTS OF THE SUPREME JUDICIAL COURTS OF THE EUROPEAN UNION, <https://network-presidents.eu/page/poland-0> [<https://perma.cc/L7EC-7FU5>] (last visited Jan. 22, 2023).

44. See *Poland's Top Judge Gersdorf Defies Retirement Law*, BBC (July 4, 2018), <https://www.bbc.com/news/world-europe-44695235> [<https://perma.cc/CP3Q-K7E3>].

Up until 2015, Poland's top judicial body enjoyed relative stability and seldom experienced controversy.⁴⁵

However, Poland has arguably been in a constitutional court crisis since the 2015 Polish parliamentary election.⁴⁶ Now-President Andrzej Duda, a notoriously staunch right-wing politician, and his PiS party have swept into office in a global wave of right-wing nationalism. PiS's right-wing politics rely on overt nationalism and self-autonomy similar to the ideological American right given its "bedrock support is in rural Poland, with its deep-rooted [Christian-Catholic] traditions."⁴⁷ However, unlike the American right, the "party is strong on social welfare . . . making it different from many other right-wing parties in Europe."⁴⁸

From the outset, Duda prioritized actionable change in accordance with one of his more controversial campaign promises: to systematically overhaul domestic courts that had been corrupted by stodgy Polish elites and stood as "remnant institutions . . . in the way of liberating, democratic developments in the country[.]" at least in Duda's and PiS's opinion.⁴⁹ In essence, PiS no longer regarded the Supreme Court as a legitimate source of dispute resolution between state organs.⁵⁰

The first of these changes was swift and forceful. Duda blocked the ratification of five judges nominated by the outgoing Civic Platform Party (PO—a Christian-democratic, pro-European, center-right party that traditionally tried to straddle the spectrum with its Centrism and failed to captivate the Polish audience after the departure of former leader, Donald Tusk, before the 2015 elections.⁵¹ Duda's move had the overt intention to thwart PiS

45. The longevity of the judges' tenures on the Polish Supreme Court when PiS came to power indicates a sustained period of stability following the end of communist rule. *See id.* (stating "Up to 40% of supreme court judges are expected to be forced out, as part of the changes which the government argues will help fight corruption and replace judges who date back to a communist era that collapsed in 1989.").

46. Marvin Wiacek, *Constitutional Crisis in Poland 2015–2016 in the Light of the Rule of Law Principle*, 298 DEFENDING CHECKS AND BALANCES IN EU MEMBER STATES 15, 16–17 (2021), https://library.oapen.org/bitstream/handle/20.500.12657/46103/2021_Book_DefendingChecksAndBalancesInEU.pdf?sequence=1#page=23 [<https://perma.cc/5JS2-L6SH>].

47. *Europe and Right-Wing Nationalism: A Country-by-Country Guide*, BBC (Nov. 13, 2019), <https://www.bbc.com/news/world-europe-36130006> [<https://perma.cc/75BZ-GPBQ>].

48. *Id.*

49. Robert Csehi and Edit Zgut, *supra* note 27, at 9.

50. Christian Davies, *Head of Polish Supreme Court Defies Ruling Party's Retirement Law*, THE GUARDIAN (July 4, 2018), <https://www.theguardian.com/world/2018/jul/04/poland-supreme-court-head-malgorzata-gersdorf-defies-retirement-law> [<https://perma.cc/S829-4FY9>].

51. Daniel Tilles, *Civic Platform Turns 20: is Poland's "Zombie Party" Now Undermining Opposition to PiS?*, NOTES FROM POLAND (Jan. 24, 2021), <https://notesfrompoland.com/2021/01/24/civic-platform-turns-20-is-polands-zombie-party-now-undermining-opposition-to-pis/> [<https://perma.cc/8N82-6RD3>].

from controlling the tribunal while PiS held the majority in the Sejm and his personal crusade proved fruitful.⁵² PO's half-hearted, reactionary nomination scheme backfired. The constitutional tribunal, sitting with 12 members and with a PO-nominated majority, deemed that two of the nominations were illegally made because spots on the court had not been vacated for those nominations yet.⁵³

Then, in an act that sent Poland and the rest of Europe into raptures, President Duda subsequently refused to swear *any* of the PO nominated judges, including the three constitutionally nominated.⁵⁴ This drew intense condemnation from the European Union, including a very notable letter from Frans Timmermans—"the EC's vice president in charge of rule of law and fundamental rights"—and a stark comparison to a coup from Martin Schulz, the head of the European Parliament.⁵⁵ This "loss of independence" also led to Poland's suspension from the European Network of Councils for the Judiciary, the EU's legal and legislative harmonization body that that "reinforces an independent yet accountable judiciary and promotes best practices to enable the judiciary to deliver timely and effective justice for the benefit of all."⁵⁶

Despite the condemning rhetoric, neither the European Union nor the EC acted to stop Duda's nominative snubbing. However, they were given an opportunity when the Polish Act of 8 December 2017 on the Supreme Court came into force.⁵⁷ While the Constitution of the Republic of Poland provides for the "irremovability" of Supreme Court judges, the Supreme

52. Jan Cienski, *Poland's Constitutional Crisis Goes International*, POLITICO (Dec. 24, 2015), <https://www.politico.eu/article/poland-constitution-crisis-kaczynski-duda/> [<https://perma.cc/7ZJ7-UBKQ>]. See Aleks Szczerbiak, *Who is Winning Poland's 'Constitutional Tribunal War'?*, THE POLISH POLITICS BLOG (Dec. 31, 2015), <https://polishpoliticsblog.wordpress.com/2015/12/31/who-is-winning-polands-constitutional-tribunal-war/> [<https://perma.cc/Y4QM-4CD2>].

53. See Cienski, *supra* note 52.

54. *Id.*

55. *Id.*

56. Jan Strupczewski, *EU Commission Sues Poland for Undermining Independence of Judges*, REUTERS (Mar. 31, 2021), <https://www.reuters.com/article/us-poland-eu-commission-lawsuit/eu-commission-sues-poland-for-undermining-independence-of-judges-idUSKBN2BN1DT> [<https://perma.cc/U5BC-EPU3>]; *European Network of Councils for the Judiciary*, EUR. LAW INST., <https://www.europeanlawinstitute.eu/membership/institutional-members/encj/> [<https://perma.cc/58XG-XXMT>].

57. Andrzej Marian Swiatkowski, *Legal Dispute Over the Constitutionality of Polish Regulations and Their Effects After the Amendment of the Provisions on Reaching the Retirement Age by the Judges of the Polish Supreme Court*, 9.3 Law. Q. 185, 187 (2019), <https://tlq.law.cas.cz/index.php/tlq/article/download/354/350> [<https://perma.cc/UH9B-KCYF>].

Court had traditionally accepted a legislature-induced retirement age at 70 since 2002.⁵⁸ Judges could continue past the age of 70 upon individual declaration and notice of medical well-being submitted to the President of the Supreme Court but could not continue past the age of 72.⁵⁹ This became accepted practice and provided a definite level of turnover amongst the Supreme Court's judges that helped the institution stay current with the changing dynamics and practices of Polish society.

Working under the guise of wanting to better reflect Polish society and working to allow judges to enjoy the benefits of retirement at an appropriate age, Duda and PiS enacted the Act of 8 December 2017 of the Supreme Court, a law that lowered the retirement age for male judges to 65 and female judges to 60.⁶⁰ In reality, the implementation of the law put approximately 40% of the judges on the Polish Supreme Court over the age of retirement.⁶¹ The act provided only a three month window to apply to *President Duda himself* for permission to continue their service as judges on the Supreme Court.⁶² Even more dubiously, the law charged the Minister of Justice, an executive official appointed by the president, with the power to “extend the active service period of judges at the ordinary quotes above and beyond the new retirement age.”⁶³ These new changes obviously benefited PiS's campaign of power centralization in the Polish judiciary and, as a result, pushed the EU and EC to develop a coordinated plan of attack in response.

In an unprecedented step, the EU invoked Article 7 of the EU Charter, the foundational document on the fundamental political, social, and economic rights for EU citizens and residents, which allowed for an escalation of political sanctions levied against Poland for breaching the bloc's core values.⁶⁴ While sanctions were not immediately imposed, the overt threat

58. *Id.* at 189.

59. *Id.*

60. *Id.* at 187; Jennifer Rankin, *Poland Broke EU Law By Trying To Lower Age of Retirement For Judges*, THE GUARDIAN (Nov. 5, 2019), <https://www.theguardian.com/world/2019/nov/05/poland-broke-eu-law-trying-lower-age-retirement-judges-says-court> [<https://perma.cc/6G22-QZ7D>].

61. Jennifer Rankin, *supra* note 60; Christian Davies, *Head of Polish Supreme Court Defies Ruling Party's Retirement Law*, THE GUARDIAN (July 4, 2018), <https://www.theguardian.com/world/2018/jul/04/poland-supreme-court-head-malgorzata-gersdorf-defies-retirement-law> [<https://perma.cc/KLZ4-EC4H>].

62. *Id.* (author's emphasis).

63. Thomas Wahl, *CJEU: Polish Retirement Rules at Ordinary Court Level Contrary to EU Law*, EUCRIM (Jan. 11, 2020), <https://eucrim.eu/news/cjeu-polish-retirement-rules-ordinary-court-level-contrary-eu-law/> [<https://perma.cc/HD6C-7LNL>].

64. Maïa de la Baume, *MEPs urge EU to push Poland closer to sanctions over rule of law*, POLITICO (July 16, 2018, 6:23 PM), <https://www.politico.eu/article/meps-adopt-call-to-finally-act-on-article-7-against-poland/> [<https://perma.cc/9EA6-GMRG>].

of triggering Article 7 was enough for the EU to send a clear message of intent to Poland, a state heavily reliant on EU funding.⁶⁵

By the summer of 2018, the EC filed suit against Poland alleging the Act of December 8, 2017 on the Supreme Court violated EU anti-discrimination law because of its incongruent treatment of retirement ages for men and women judges. The EC also included Poland's alleged violation of Article 19 TFEU—the EU's fundamental anti-discrimination mandate—for removing judicial autonomy and impartiality through the empowerment given to the Minister of Justice.⁶⁶ Poland summarily argued that the difference in retirement age for men and women was “a measure of positive discrimination” that allowed female judges to limit controversial exposure in their professional life and provide them remedy through retirement benefits at an earlier age.⁶⁷

President Duda refused to back down his support for the law, and the EC referred the case to the ECJ in December 2017.⁶⁸ After nearly a year and a half of litigation between the EC and Poland, the ECJ definitively found that Poland's law lowering the retirement age of ordinary court judges contradicted TFEU article 157's gender equality protections meant to “ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.”⁶⁹ This holding complied with recent ECJ precedent that struck down Poland's law lowering the retirement age of Supreme Court judges.⁷⁰ Likewise

65. See Jo Harper, *Could the EU Fine Poland?*, DW (July 19, 2019), <https://www.dw.com/en/eu-weighs-costs-of-punishing-poland/a-49640512> [<https://perma.cc/52C2-6PWR>] (“Some member states want to tie EU funding to the rule of law, a measure that could hit Poland . . . The Commission earlier this year proposed cutting about one quarter of Poland's funding in the 2021-2027 budget as a starting point for talks.”); Silvia Amaro, *'We will not be intimidated': EU and Poland clash over funding and the rule of law*, CNBC (Oct. 19, 2021, 8:13 AM), <https://www.cnbc.com/204721/10/19/eu-and-po48land-clash-over-funding-and-the-rule-of-law.html> [<https://perma.cc/E4H6-6JFD>].

66. European Commission Press Release 134/19, Polish rules relating to the retirement age of judges and public prosecutors, adopted in July 2017, are contrary to EU law (Nov. 5, 2019); Treaty on the Functioning of the European Union, Oct. 21, 2012, 2012 O.J. (C 326), TFEU art. 19 [hereinafter TFEU].

67. European Commission Press Release 134/19, Polish rules relating to the retirement age of judges and public prosecutors, adopted in July 2017, are contrary to EU law (Nov. 5, 2019).

68. See *id.*

69. *Id.*; see also TFEU, *supra* note 66, art. 157.

70. European Commission Press Release 19/3376, European Commission statement on the judgment of the European Court of Justice on Poland's Supreme Court law (June 24, 2019).

presented with the issue of the exempting powers given to the President of the Republic, the ECJ agreed with the EC that the ambiguity of the power allocation to the President to extend term limits for certain judges clearly over extended the reach of the executive into what is supposed to be an impartial judiciary.⁷¹

In this first foray in the courts, it looked as though the EC had dealt a decisive punch to PiS's court reorganization plans. Poland eventually heeded to the mandate of the ECJ's ruling (although PiS Likely framed it differently) and reversed both retirement age laws, albeit only because PiS attempted to call the EU's bluff on imposing sanctions in the absence of repealing the law.⁷² The EU attempted to make an example of this Polish defiance to the ECJ ruling and imposed monetary fines for Warsaw's delay tactics.⁷³ In hindsight, Poland's purposeful non-implementation of the ECJ's judgments blatantly foreshadowed the Polish government's attitude towards the EU's introduction into the national realm of Polish law. Going forward, the Polish formula would follow the now-recognizable pattern of implementing "new irreversible facts [(i.e., laws)] on the ground" while simultaneously prolonging any adjudicative dispute resolution to either call the EU's bluff or force the EU into increasingly drastic enforcement proceedings.⁷⁴

IV. POLAND'S LAW ON THE SUPREME COURT OF 8 DECEMBER 2017

Understanding the latitude that they were able to enjoy through the retirement age law saga, President Duda and PiS subsequently executed a bolder move in their self-perceived modernization of Poland. The *ustawa o Sądzie Najwyższej* (Law on the Supreme Court) of 8 December 2017 unexpectedly established two new chambers within the Supreme Court: the Chamber of Extraordinary Control and Public Affairs of the Supreme Court and the Disciplinary Chamber ("DC").⁷⁵ Under the statute, the

71. *Id.*

72. Khatya Chhor, *Poland defies EU as law forcing judges to retire comes into force*, FRANCE 24 (July 9, 2018), <https://www.france24.com/en/20180704-poland-supreme-court-gersdorf-judge-defies-retire-rule-law-article-7-eu-commission> [https://perma.cc/ESE3-CLKW].

73. Court of Justice of the European Union Press Release 47/20 (stating Poland must immediately suspend the application of the national provisions on the powers of the Disciplinary Chamber of the Supreme Court with regard to disciplinary cases concerning judges) (Apr. 8, 2020).

74. Laurent Pech, Patrik Wachowiec, & Dariusz Mazur, *Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action*, 13 HAGUE J. ON RULE L. 1, 39 (2021).

75. Act on the Supreme Court of 8 December 2017, Art. 3(4) (Venice Commission's English translation) [hereinafter "Supreme Court Law"].

Disciplinary Chamber is comprised of judges nominated by Poland's National Council on the Judiciary ("KRS" in Polish), a 15 member of judicial panel elected by the Sejm.⁷⁶ In Supreme Court disciplinary proceedings the DC is mandated to preside as the majority over both instances of first and second impression.⁷⁷ This means judges elected to the DC hold more collective voting power to decide a disciplinary case than anyone else on the panels hearing disciplinary proceedings.⁷⁸ The Law on the Supreme Court differs from the disciplinary body overseeing ordinary Polish courts, which are only allowed to be tribunals of second instance in disciplinary proceedings.⁷⁹

Apart from the consequences created by the statute's establishment of the DC for Supreme Court judges, the Law on the Supreme Court also created a new downward-facing connection between the Supreme Court and the Polish ordinary courts and courts of appeal. Under Article 97, the Supreme Court is obligated to issue a finding of error to a lower court when the lower court "obvious[ly] breach[es] the law when examining a case."⁸⁰ Whenever the Supreme Court finds an erroneous decision has been issued, the Supreme Court may file a request for a disciplinary case to the DC for examination.⁸¹ Additionally, the Supreme Court is the "disciplinary court of first instance" should the DC initiate any disciplinary proceedings.⁸² Thus, the Polish Supreme Court, whose members are nominated by the President and ratified by the Sejm, has the authority to refer lower court judges to discipline for errors the Supreme Court deems erroneous.⁸³

The European Commission predictably responded with vehement opposition to the Law on the Supreme Court, yet PiS remained undeterred passing stringent new amendments through the Act of Law of 20 December

76. C-791/19, *Commission v. Poland*, 2021 E.C.R. 366, para. 43.

77. Supreme Court Law, *supra* note 75, art. 73(1)-(2).

78. *Id.*

79. See C-791/19, *Comm'n v. Poland*, ECLI:EU:C:2021:366, ¶¶ 46-47 (May 06, 2021); Poland Act on the Supreme Court; see also *supra* note 75, art. 97.

80. Supreme Court Law, *supra* note 75, art. 97.

81. *Id.*

82. *Id.*

83. *The Case of Judge Igor Tuleya: Continued Threats to Judicial Independence in Poland*, A.B.A. CENTER FOR HUM. RTS., Nov. 2020 at 3-4, https://www.americanbar.org/content/dam/aba/administrative/human_rights/justicedefenders/igor-tuleya.pdf [<https://perma.cc/7ZLSGJRQ>].

2019.⁸⁴ The Act imposed even more restrictions on judicial conduct for both Supreme Court and lower court judges.⁸⁵ These new amendments start changing the Law on the Supreme Court of 8 December 2017 by restricting judges at any level from questioning “the powers of courts and tribunals, constitutional state bodies and law enforcement and control bodies.” The amendments make it unacceptable for any common court or other authority to analyze the government’s compliance with their right to appoint a judge, meaning a judge could face discipline for investigating whether a judge was correctly appointed at all.⁸⁶ Judges also have to submit new disclosures about their non-judicial conduct “to the presidents of the relevant appellate court and by the presidents of the appellate courts to the Minister of Justice.”⁸⁷ They must detail associations of any type to businesses, non-business performing groups or societies, political parties, or membership groups and associations—all of which information is published by public bulletin for the DC to review.⁸⁸

Finally, the Act of Law of 20 December 2019 implements concerningly broad conduct principles that judges are expected to follow. To avoid discipline, judges must refrain from “public activities that are incompatible with the principles of judicial independence and the impartiality of judges” and “actions questioning the existence of the official relationship of a judge, the effectiveness of the appointment of a judge, or the constitutional mandate of an organ of the republic of Poland.” In not so uncertain terms, the amendment statute drastically widened the scope of the DC’s jurisdiction to prosecute self-perceived disciplinary violations so long as the alleged conduct could be placed under the widely defined umbrella of judicial impropriety.

For PiS, the combined effects of the Law on the Supreme Court of 8 December 2017 and the Act of Law of 20 December 2019 created solutions

84. Act of Law of 20 December 2019—Amendments to the Act on the System of Common Courts, the Act on the Supreme Court, the Act on the National Council of the Judiciary and Certain other Acts (Venice Commission’s English translation).

85. European Commission Press Release 1957/19, Rule of Law: European Commission launches infringement procedure to protect judges in Poland from political control (Apr. 3, 2019); *see* Act of Law of 20 December 2019—Amendments to the Act on the System of Common Courts, the Act on the Supreme Court, the Act on the National Council of the Judiciary and Certain other Acts (Venice Commission’s English translation).

86. Act of Law of 20 December 2019—Amendments to the Act on the System of Common Courts, the Act on the Supreme Court, the Act on the National Council of the Judiciary and Certain other Acts (Venice Commission’s English translation), at 10.

87. *Id.* art. 88a §§ 1–2.

88. *See* Act of Law of 20 December 2019—Amendments to the Act on the System of Common Courts, the Act on the Supreme Court, the Act on the National Council of the Judiciary and Certain other Acts 23–24, art. 9–10 (Venice Commission’s English translation).

that “aim to improve the work of courts, increase the apoliticality [*sic*] judges and the transparency of the justice system.”⁸⁹

V. APPLICABLE EU LAW

The European Union and countries like Belgium, Denmark, Finland, and Sweden all denounced the laws as having a “chilling effect” on the Polish judiciary.⁹⁰ An extensive network of primary law and secondary caselaw has established a basic right to a fair and impartial trial within the European Union. According to the EC’s website, “Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.”⁹¹

Article 258 of the TFEU establishes the EC’s ability to take issue with the actions of member states that fail to fulfill their obligations under the various treaties comprising the EU.⁹² The Treat on the Functioning of the European Union states, “If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.”⁹³ This is fundamental to the EC’s ability to take on Poland’s laws in such a confrontational manner.

With this grant of authority to uphold the laws of the EU, the EC must then look to the rest of the EU treaties to establish it’s standing. The ECJ’s 2019 decision suspending the Polish retirement age law confirmed the applicability of article 19 TFEU to the EC’s standing to take enforcement actions against member states who infringe on the rights of their citizens.⁹⁴

89. Ministry of Justice of the Republic of Pol., *Statement on the act performing courts*, Gov.PL, <https://www.gov.pl/web/justice/statement-on-the-act-reforming-courts> [https://perma.cc/D5XY-EMJC].

90. Case C-791/19, Eur. Comm’n v. Pol., ECLI:EU:C:2021:366, ¶ 45 (May 6, 2021).

91. *Right to an effective remedy and to a fair trial*, EUROPEAN COMM’N, https://ec.europa.eu/info/aid-development-cooperation-fundamental-rights/your-rights-eu/know-your-rights/justice/right-effective-remedy-and-fair-trial_en [https://perma.cc/58K4-JF5T] (last visited Nov. 16, 2021).

92. TFEU art. 258; Case C-791/19, Eur. Comm’n v. Pol., ECLI:EU:C:2021:366 (July 15, 2021).

93. TFEU art. 258; Case C-791/19, Eur. Comm’n v. Pol., ECLI:EU:C:2021:366 (July 15, 2021).

94. *European Commission statement on the judgment of the European Court of Justice on Poland’s Ordinary Courts law*, EUROPEAN COMM’N (Nov. 5, 2019), <https://>

Specifically, the 2019 decision found that because the ordinary courts of member states are tasked with upholding EU-guaranteed rights for citizens, those courts must be governed and organized in accordance with EU law, not just domestic law.⁹⁵ This edict is enshrined in the second subparagraph of Article 19(1) of the Treaty of the European Union provides that “Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.”⁹⁶ Because the 27 EU member states accepted the supremacy of the EU treaties when they joined the Union, Article 19 must then be read that the EC—through its grant to enforce the treaties of the union—can use the ECJ to ensure citizen access to impartial and efficient judicial systems.⁹⁷

Furthermore, the EC holds article 19 works to positively affect the individual’s access to an impartial judiciary, because citizens and national courts can already appeal to the ECJ for rulings and guidance. For example, when a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision is necessary to enable it to give judgment, request the ECJ to give a ruling.⁹⁸ Article 267 TFEU guarantees this referral pathway to the ECJ, providing that any question raised in a case pending before a national court of a member state where there is uncertainty as to the relationships between the national law and EU law, that court or tribunal may bring the matter before the ECJ.⁹⁹

With these theories on the application of the law already in European legislators minds’, the ECJ’s ruling on the importance TFEU article 19 became public policy for the European Council’s joint session in July 2020. The “Council accepted that the EU should make future solidarity conditional on the respect for the rule of law.”¹⁰⁰ Although that mere statement sounds borderline aspirational as written, this marked a complete shift from the EU’s previously more devolved view on judiciaries to the recent establishment of direct, affirmative compliance with the EU’s ability to oversee, and intervene in, National law.

ec.europa.eu/commission/presscorner/detail/es/statement_19_6225 [<https://perma.cc/Q2KK-9QZ2>].

95. See Case C-619/18, Eur. Comm’n v. Pol., ECLI:EU:C:2019:531 (June 24, 2019).

96. Consolidated Version of the Treaty on European Union TITLE III – PROVISIONS ON THE INSTITUTIONS, July 6, 2016, art. 19, 2016 O.J. (C 202) 27 [hereinafter TFEU 2016].

97. Case C-791/19, Comm’n v. Pol., ECLI:EU:C:2021:366, ¶¶ 63–65 (May 6, 2021).

98. TFEU, art. 267; see generally C-791/19, Eur. Comm’n v. Pol., ECLI:EU:C:2021:366 (May 6, 2021).

99. TFEU, art. 267; Eur. Comm’n v. Pol., ECLI:EU:C:2021:366, ¶ 132 (May 6, 2021).

100. *Article 19 mechanism: The need for a robust defense of EU rule of law*, EUROPEAN STABILITY INST. (July 23, 2020), <https://www.esiweb.org/publications/article-19-mechanism-need-robust-defence-eu-rule-law> [<https://perma.cc/URP9-8T9N>].

In the eyes of the EU and the EC, the combination of these articles, as well as their traditional interpretations, impose a duty on member states to uphold impartial rights to trial and access to the judiciary. Poland's disciplinary law, at least in the eyes of the EU, controverts this right because it gives de facto control of the judiciary to the executive and removes impartiality.

VI. THE CASE: WHEN LEGAL HEADS COLLIDE

The amendments passed by the Sejm in the Act of Law of 20 December 2019 proved to be the tipping point for the EC. On March 31, 2021, the EC referred Poland to the ECJ regarding the amendments changing the disciplinary regime of the Polish judiciary.¹⁰¹ Having launched initial infringement proceedings back in April 2019, the Commission determined that Poland's continued efforts to undermine the independence of Polish judges was incompatible with the primacy of EU law.¹⁰² The EC made four distinct arguments in its referral to the ECJ: (1) that the laws on the judiciary prevent Polish courts from assessing the requirements of judicial independence by threatening discipline for any judge who questions the legality of an appointment, official, or judge; (2) that the laws on the judiciary broaden the already open-ended definitions of disciplinary offenses by allowing the content of judicial decisions, including a judge's actions in making a decision, to qualify as an offense subject to disciplinary investigation; (3) that the Law on the Supreme Court of 8 December 2019 established a politically-selected Disciplinary Chamber that can take unilateral disciplinary action against Supreme Court judges and cut the judges' salaries, tenure, retirement benefits, and employment eligibility; and (4) that the 2020 amendments imposed a disproportionate obligation on judges to provide information for the purposes of publication about specific non-professional activities that could subject a judge to discipline.¹⁰³

The ECJ's opinion consolidated the parties' arguments into four sections. First, the Court considered the Commission's submission that Article

101. European Commission Press Release 1524/21, Rule of Law: European Commission refers Poland to the European Court of Justice to protect independence of Polish judges and asks for interim measures (Mar. 31, 2021).

102. *Id.*; European Commission Press Release 1957/19, Rule of Law: European Commission launches infringement procedure to protect judges in Poland from political control (Apr. 3, 2019).

103. European Commission Press Release 1524/21, *supra* note 101.

19(1) TEU allows the ECJ to ensure the implementation of Articles 47 and 48 of the European Union Charter of Fundamental Rights (“the Charter”).¹⁰⁴ To clarify, Articles 47 and 48 establish a right to an effective remedy and to a fair trial, a presumption of innocence, and a right of defense for European citizens.¹⁰⁵ Poland opened its counterarguments with the position that the scope of the Charter is clarified by Article 51 which doesn’t extend the protections of Articles 47 and 48 to domestic institutions.¹⁰⁶ Thus, Article 19 cannot unilaterally grow the jurisdiction of the Charter’s protection and give the ECJ purview to obligate Polish domestic courts to establish EU-driven ideals of rights to fair trial and legal presumptions.¹⁰⁷

In response, the ECJ found in favor of the EC on this based on its well-established notion that “the material scope of . . . Article 19(1) TEU . . . refers to ‘the fields covered by Union law.’”¹⁰⁸ The Court opined that the Supreme Court and the ordinary Polish courts “rule on questions concerning the application or interpretation of Union law and thus [fall] within the fields covered by Union law.”¹⁰⁹ Because these courts fall within the jurisdiction of Union law, domestic laws removing the impartiality of the judiciary directly affect the fundamental rights guaranteed in the Charter and are thus incompatible with EU law.¹¹⁰

Second, the Court heard arguments concerning the treatment of the contents of judicial decisions as a potential disciplinary offense.¹¹¹ The EC contended that Article 97 of the Law on the Supreme Court and its counterpart, Article 107 of the Law on the Ordinary Courts, establish a regime whereby disciplinary authorities can chill judicial action by imposing disciplinary liability for the contents of judicial decisions.¹¹² Asserting this amounts to the exercise of political control over an essential function of the judiciary, the EC provided examples of three judges disciplined in 2019 for questioning the independence of certain judges and judicial functions in their respective judgements.¹¹³ In rebuttal, Poland submitted that no disciplinary proceedings had been initiated based on the content of judicial decisions and that the cases cited by the EC were “irrelevant.”¹¹⁴

104. Case C-791/19, Eur. Comm’n v. Pol., ECLI:EU:C:2021:366, ¶¶ 37–39 (May 6, 2021).

105. Charter of Fundamental Rights of the European Union, Oct. 26, 2012, arts. 47–48, 2012 O.J. (C 326) 405.

106. Case C-791/19, Eur. Comm’n v. Pol., ECLI:EU:C:2021:366, ¶ 38 (May 6, 2021).

107. *See id.*

108. *Id.* ¶ 64.

109. *Id.* ¶ 65.

110. *See id.* ¶¶ 65–66, 68–69.

111. *See id.* ¶¶ 40–45.

112. *Id.* ¶ 40.

113. *Id.* ¶¶ 40–42.

114. *Id.* ¶ 44.

Specifically, Poland argued the EC failed to sufficiently prove the combined articles infringe on judicial independence.¹¹⁵

The ECJ found Poland's proof by lack of discipline ineffectual. The Court explained that Article 19 does not create a particular model of discipline for judges, but instead establishes a set of "necessary guarantees" as safeguards against attacks on impartiality.¹¹⁶ Disciplinary liability is itself part of what guarantees judicial independence, but Poland's expanded scope of liability moves beyond reasonable measures of discipline to chill the expression of judges in exercising their duties.¹¹⁷ Allowing the content of judicial decisions to be used as basis for disciplinary offenses moves beyond punishing professional misconduct to potential punishment for judgments that do not align with the political ideology of the politically-selected DC and/or KRS.¹¹⁸

Third, the ECJ analyzed the concerns surrounding the independence and impartiality of the DC. In Poland's view, the Law on the Supreme Court clearly establishes the independence of the DC by making its constituent judges irremovable by giving them full immunity and 40% more pay than Supreme Court judges.¹¹⁹ Additionally, Poland asserted the KRS appointing judges to the DC does not differ from the appointment processes of other major European countries whose executives nominate judges.¹²⁰ On the other hand, the Commission argued there are inextricable links between the KRS and the Sejm, who appoints judges directly to the KRS, and between the DC and the KRS, who appoints judges directly to the DC.¹²¹ The EC contended the "structural breaks" created by irremovability, immunity, and higher pay for DC judges are symbolic measures that don't address the real issues surrounding impartiality.¹²²

In its analysis, the ECJ established that its own caselaw does not criminalize the nomination or appointment of judges to a national judiciary by the president or other political members of the government.¹²³ While that kind of direct appointment or nomination is legal, Poland's layering of the KRS and the DC create an atmosphere where the KRS is susceptible

115. *Id.* ¶ 47.

116. Case C-791/19, *Eur. Comm'n v. Pol.*, ECLI:EU:C:2021:366, ¶ 76 (May 6, 2021).

117. *Id.* ¶¶ 75–77.

118. *Id.*

119. *Id.* ¶ 48.

120. *Id.*

121. *Id.* ¶¶ 46–47.

122. *Id.* ¶¶ 46–47, 49.

123. *Id.* ¶¶ 88–89.

to pressure from the Sejm and the DC is susceptible to pressure from the KRS.¹²⁴ The Court decided the overt susceptibility to top-down pressure renders factors like irremovability, immunity, and higher pay ineffective in light that the DC is selected by an essentially partisan body in the first place.¹²⁵ Therefore, the DC cannot be an impartial chamber under its current structural framework.¹²⁶

Lastly, the ECJ heard arguments on whether Article 97 of the Law on the Supreme Court and its counterpart, Article 107 of the Law on the ordinary courts, infringe TFEU Article 267's referral procedure by subjecting national court judges who reference matters to the ECJ to potential disciplinary proceedings.¹²⁷ The EC conjectured that Article 97 and Article 107 provide a broad basis for referring preliminary rulings to disciplinary proceedings based on those rulings' contents and that preliminary rulings referring questions of law to the ECJ—a procedural right created by Article 267 TFEU—were targeted by Polish disciplinary authorities to chill such referrals.¹²⁸ Poland's response mimicked that of its second argument: “no infringement has been made out . . . as no disciplinary proceedings have been instituted” thus far.¹²⁹

Completing its unanimous agreement with the Commission's positions, the ECJ found that subjecting judges to disciplinary proceedings simply for referring cases to the ECJ eliminates Poland's ability to understand the “broader context and application in practice” of Polish law in the totality of European circumstances.¹³⁰ The Court stated that Poland's chilling of referrals to the ECJ makes little sense considering Article 267 TFEU provides an optional pathway for national courts to submit references for clarification of “national measures that in any way prevent or obstruct national courts from making use of their discretion.” The Court was adamant in its defense of Article 267's referral procedure and questioned how Poland could claim judicial independence while stripping the independence of judges to make referrals on questions of law in the normal course of their

124. *Id.* ¶¶ 90–91.

125. *Id.* ¶¶ 48, 96–98.

126. Case C-719/19, *Eur. Comm'n v. Pol.*, ECLI:EU:C:2021:366, ¶¶ 99–100 (May 6, 2021). In paragraphs 97 and 98 of the ECJ's opinion the Court addresses decisions by the Polish Supreme Court that seem to agree with the idea that the DC is not an impartial body within the Polish judiciary. *Id.* at 98. However, my understanding of the circumstances surrounding this case leads me to believe that Supreme Court was not taking issue with the DC's lack of impartiality, but rather was affirming its legality under the Polish Constitution in light of opposition from the EC.

127. *Id.* ¶¶ 58–59.

128. *Id.* ¶¶ 126–28.

129. *Id.* ¶ 127.

130. *Id.* ¶ 131.

practice.¹³¹ Overall, the ECJ decided that the Polish laws on the courts limited the independence of judges and limited judges' access to determining Polish legal compatibility with EU law.¹³²

The ECJ thus decided *Commission v. Poland* completely in the EC's favor.¹³³ The Court did not sugarcoat its vehement disapproval of the Polish laws before it, imploring that the "near prospect that a national judge may be subject to disciplinary proceedings or measures for making a reference[, judgement, or other non-judicial conduct] strikes at the heart of the . . . very foundations of the Union itself."¹³⁴ The judgment's delivery in May 2021 was followed by an announcement in August that the Polish government was going to dismantle the DC as created by the Law on the Supreme Court, an apparent success for the EC's enforcement measures.¹³⁵ Before any movement could be made, however, the rule of law saga decided to take yet another turn.

VII. PUNCH, COUNTERPUNCH: THE POLISH CONSTITUTIONAL TRIBUNAL RESPONDS

Writing an article on the conflict between European supranational rule of law and the Polish government's assertion of national legal sovereignty over its national courts was never going to be a simple task. However, the events of late October 2021 threw a wrench in the mechanics of this paper's analysis of the ECJ's strike down of Poland's laws establishing and defining disciplinary chambers for domestic judges.

On October 7, 2021, Poland's Constitutional Tribunal ruled that Polish law takes precedence over EU law in areas where the two legal codes clash.¹³⁶ Specifically, the Tribunal found that Articles 1, 2, and 19 of the Treaty on the European Union and some case law from the ECJ directly

131. *See id.*

132. *Id.* ¶¶ 131–32.

133. *Id.* ¶ 135.

134. *Id.* ¶ 132.

135. *Poland to dismantle disciplinary chamber for judges after EU row*, AL JAZEERA (Aug. 17, 2021), <https://www.aljazeera.com/news/2021/8/17/poland-to-dismantle-disciplinary-chamber-for-judges-after-eu-row> [https://perma.cc/T5Z2-8J9P].

136. Marta Laser-Markey, *Poland's Constitutional Tribunal on the status of EU law: The Polish government got all the answers it needed from a court it controls*, EUROPEAN LAW BLOG (Oct. 21, 2021), <https://europeanlawblog.eu/2021/10/21/polands-constitutional-tribunal-on-the-status-of-eu-law-the-polish-government-got-all-the-answers-it-needed-from-a-court-it-controls/> [https://perma.cc/QS2L-AP44].

conflict with Poland’s Constitution.¹³⁷ Sitting in a 12-2 majority, the Tribunal stated the ECJ did not retain supreme legal authority over Polish law regardless of Poland’s membership in the EU since 2004.¹³⁸ The Tribunal took particular issue with two key articles of the Treaty on the European Union (“TEU”): Article 1’s aspiration that member states will join the union to form “an ever closer union among the peoples of Europe” and Article 19’s edict that the ECJ “shall ensure that in the interpretation and application of the Treaties the law is observed.”¹³⁹

In regards to Article 1, the Tribunal found that the ECJ interpreted the idea of “an ever closer union” too broadly to the point where EU authorities can now “act outside the scope of the competencies conferred upon them by the Republic of Poland in the Treaties.”¹⁴⁰ Rather fatalistically, the Tribunal stressed an unwavering belief that continued submission to Article 1 would remove the Polish constitution as the supreme law of the Republic of Poland and would effectively render Poland unable to “function as a sovereign and democratic state.”¹⁴¹ The Tribunal best found that TEU Article 1 was inconsistent with at least three separate articles of the Polish constitution.¹⁴²

The Constitutional Tribunal gave similar treatment to TEU Article 19. The majority held Article 19 gives domestic courts the power to “bypass the provisions” of the Polish Constitution and Polish national law to uphold non-sovereign EU law.¹⁴³ Most importantly, the Tribunal took aim at the ECJ for its unilateral development of a jurisprudential guarantee of effective legal protection in areas covered by EU law that essentially grants domestic courts the ability to review the legality of national judicial appointment procedures, the President’s actions in appointing judges, and the KRS’ ability to request the appointment of certain judges.¹⁴⁴ The Court concluded that the powers of review created by the ECJ’s expansive

137. *Id.*; Claudia Ciobanu, *What the Polish Constitutional Tribunal Ruling Means In Practice*, BALKAN INSIGHT (Oct. 18, 2021), <https://balkaninsight.com/2021/10/18/bim-fact-check-what-the-polish-constitutional-tribunal-ruling-means-in-practice/> [https://perma.cc/X7UW-47NJ].

138. Monica Scisłowska, *Court rules Polish constitution has primacy over EU laws*, ASSOCIATED PRESS (Oct. 7, 2021), <https://apnews.com/article/european-union-poland-europe-courts-1175aa5efa731c9cac6189443eee3f9c> [https://perma.cc/8MUM-BTWN].

139. Ciobanu, *supra* note 137.

140. Case No. K 3/21, Assessment of the conformity to the Polish Constitution of selected provisions of the Treaty on European Union, ¶ 1(a)-(c), Constitutional Tribunal of Pol., (Oct. 7, 2021), <https://trybunal.gov.pl/en/hearings/judgments/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej> [https://perma.cc/E6SE-DCJ2].

141. *Id.* ¶ 1(b)-(c).

142. *Id.* ¶ 1(c).

143. *Id.* ¶ 1(c).

144. *Id.* ¶ 2-3.

interpretation of Articles 19 are far beyond the constitutional purview of the domestic judiciary.¹⁴⁵ According to the Tribunal “the ECJ should only interpret competences which are directly expressed in the Treaties;” everything beyond that should be recognized as a violation.¹⁴⁶

The buildup to this counter-ruling from the Constitutional Tribunal is the culmination of President Duda’s and PiS’s work to change the Polish judiciary. In the time PiS has held power, every single justice of the now 14-member Constitutional Tribunal was nominated by PiS or a coalition partner and subsequently approved for office.¹⁴⁷ Despite the Act of Law of 20 December 2019’s enhanced scrutiny on the political affiliation of judges, some of the Constitutional Tribunal’s members are former PiS party members.¹⁴⁸ The majority’s holding stands as a defiant victory for PiS and President Duda in the face of mounting continental opposition to Poland’s assertion of national legal primacy.

The European Union responded with expected condemnation. The European Parliament condemned the Constitutional Tribunal’s decision as proof that the Tribunal “lacks legal validity and independence, and is unqualified to interpret the country’s constitution.”¹⁴⁹ Unsurprisingly, the Parliament reasserted that EU law has continuously held primacy over national law, including constitutional provisions.¹⁵⁰ Surprisingly, the Parliament’s sentiment was echoed by 27 retired judges of the Polish Constitutional Tribunal.¹⁵¹ In a statement issued just days after the Tribunal’s decision, the group of retired judges uniformly stated that the Tribunal’s findings were entirely untrue and that Poland had an obligation to adhere to EU law and ECJ rulings as a Union member state.¹⁵²

145. *Id.* ¶ 1(c).

146. Adam Łazowski & Michał Ziolkowski, *Knocking on Polesis’s Door?*, CTR. FOR EUR. STUDIES (Oct. 21, 2021), <https://www.ceps.eu/knocking-on-polesis-door/> [<https://perma.cc/8TE3-57ZV>].

147. *Constitutional Tribunal (Poland)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Constitutional_Tribunal_\(Poland\)#Current_justices](https://en.wikipedia.org/wiki/Constitutional_Tribunal_(Poland)#Current_justices) [<https://perma.cc/CT54-J5NF>].

148. Adam Easton, *Poland’s top court ruling marks major challenge to EU laws*, BBC (Oct. 7, 2021), <https://www.bbc.com/news/world-europe-58835758> [<https://perma.cc/2R78-Z9MH>].

149. European Parliament Press Release IPR15016, Poland: Constitutional Tribunal is illegitimate, unfit to interpret constitution (Oct. 21, 2021).

150. *Id.*

151. Stanisław Biernat et al., *Statement of 27 Retired Judges of the Polish Constitutional Tribunal*, VERFASSUNGBLOG (Oct. 11, 2021), <https://verfassungsblog.de/statement-of-retired-judges-of-the-polish-constitutional-tribunal/> [<https://perma.cc/LP8T-K69A>].

152. *Id.*

The Tribunal's decision is arguably one of the many steps that will constitute the ongoing saga between Poland and the European Union. On November 15, Poland's prosecutor general sensed an opportunistic moment and asked the Constitutional Tribunal "to check whether legal provisions under the [ECJ] imposed penalties on Poland are compatible with the Polish Constitution."¹⁵³ Then on November 16, the ECJ ruled that Poland's powerful justice minister, who is also the country's chief prosecutor, wields broad power to "second judges to hire criminal courts and terminate such secondments at any time."¹⁵⁴ As the country's public prosecutor, the ECJ found it would be unreasonable to allow him to select temporary judges who will hear cases brought by the minister. These tit-for-tat blows seem as though they will continue well into the future until compromise is found.

VIII. CONCLUSION

Poland's rule of law saga is not unprecedented. Although no mention of the Union's legal supremacy was made in the 1957 Treaty of Rome founding the European Economic Community or in any subsequent EU treaty, the ECJ established EU legal primacy as a bench-written doctrine in 1964.¹⁵⁵ Notable challenges to the primacy of Union law began in 1974 when the German Constitutional Court took up a series of cases questioning the growing theory of primacy.¹⁵⁶ Even so, Poland's interjections in the rule of law debate have created new and substantial questions about how the European Union is to properly function moving forward. The Union began as a cooperative community with the dual aim of preserving the states as autonomous entities and living together in common union.¹⁵⁷ The EU's recent forays with authoritarian nationalism in Poland, however, have jeopardized the delicately balanced nature of the relationship between those two aims.

The European Union cannot survive without being shaped and guided by the member states that constitute it. It is "an evolving, experimental

153. *Prosecutor General asks Constitutional Tribunal about CJEU fines*, THE FIRST NEWS (Nov. 15, 2021), <https://www.thefirstnews.com/article/prosecutor-general-asks-constitutional-tribunal-about-cjeu-fines-26028> [https://perma.cc/CN6F-CB2B].

154. Zosia Wanat, *Poland smacked down again by top EU court*, POLITICO (Nov. 16, 2021, 1:49 PM), <https://www.politico.eu/article/poland-zbigniew-ziobro-justice-top-eu-court/> [https://perma.cc/DBS8-K8PY].

155. Stefan Auer & Nicole Scicluna, *Poland has a point about the EU's legal supremacy*, POLITICO (Oct. 19, 2021, 10:33 AM), <https://www.politico.eu/article/poland-court-eu-legal-supremacy/> [https://perma.cc/L83E-CMLF].

156. *Id.*

157. Signe Larson, *The European Union as a Federation: A Constitutional Analysis* (July 2018) (Ph.D. thesis, London School of Economics and Political Science) (on file with Department of Law of the London School of Economics).

polity that is neither a fully-fledged federation, nor merely a community of sovereign nation states.”¹⁵⁸ Yes, Poland’s actions have strained the relationship between the EU and its member states. Even so, growth out of these current tribulations requires the collective action of the member states to find an amicable solution that ameliorates the relationship between Union and national law *and* strengthens the EU’s position as an organization working to implement economic, political, and social cooperation for the better of Europe.

158. Auer & Scicluna, *supra* note 155.

