



A crisis at the heart of the Union: Warsaw, Brussels and the Rule of Law

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The rise of illiberal democracies within Europe is alarming. Poland's ruling Law and Justice party (PiS) has been waging war against the integrity of the Polish Judiciary. Starting in 2015, the PiS has moved to install pro-party justices across the Polish court system. In this context, EU law and EU courts have become especially important bulwarks of judicial independence. However, the Polish Constitutional Tribunal ruled in early October that the European Union's law does not have primacy over some sections of the Polish Constitution. By limiting the application of EU law and reach of EU courts, the recent ruling of the Polish Constitutional Tribunal not only undermines the rule of law in Poland, but also constitutes a serious challenge to the European Union itself. This transgression is too grave for the EU to ignore. The period in which dialogue can be used to avert this crisis has passed. The conflict between Brussels and Warsaw is quickly devolving into a zero-sum game. However, the reality is that no party will truly win this dispute, and the ultimate losers of the conflict will be the Polish people and the citizens of the EU at large.

Background

The PiS has been working feverishly to consolidate its power by breaking down the separation of powers between the Republic of Poland's executive, legislative, and judicial bodies. After the 2015 Polish Election, the PiS government refused to confirm judicial appointments made by the previous parliament and instead appointed Justices supportive of the party to the Constitutional Tribunal (Gersdorf & Pilich, 2020, p. 345). This action stripped the Constitutional Tribunal of independence and violated Polish law. Furthermore, president of the Constitutional Tribunal, Julia Przyłębska, allowed three additional judges to be nominated by parliament to the Tribunal (Pech, Wachowiec & Mazur, 2021, p. 6). These appointments were done without any formal legal basis and constituted undue political interference in the judiciary.

The next court to fall to PiS's influence was the Polish Supreme Court in 2017. In 2017 the Polish government made changes to the retirement criteria of judges on the Supreme Court. The Polish government intended to force certain judges on the supreme court to retire early

and then replace them with judges under PiS influence (Pech et al. 2021, p. 8). However, the Commission launched infringement proceedings on July 2nd, 2018, in response to the Polish government's refusal to address the loss of judicial independence on the Supreme Court (Pech et al. 2021, p. 8). Despite opposition from the EU, the infringement proceedings did little to halt the PiS's campaign against the Polish Judiciary.

PiS also established a Disciplinary Chamber (DC) to deal with judges whose rulings the PiS disagreed with. In 2019, the President of the Association of Polish Judges, Krystian Markiewicz, was subjected to disciplinary proceedings for critiquing the Supreme Court's Disciplinary Chamber (Gersdorf & Pilich, 2020, p. 374). The existence of the disciplinary chamber is an insult to the rule of law. The DC established by the Polish Government gave the PiS sweeping power over the independence of Polish judges. The DC's existence allows the Polish authorities to exert political control of the country's judges based on the content of their judgments (Pech et al., 2021, p. 14). Polish judges have been disciplined and removed, for applying EU law

in their judgments, in contravention to the desires of the PiS. Between 2017-2018 158 presidents and vice-presidents of courts were removed from their positions without any proper justification or judicial review (Pech & Wachowiec, 2021, p. 13). As such, the establishment of the Disciplinary Chamber of the Supreme Court and infiltration of the Supreme Court and Constitutional Tribunal, the EU no longer views the Polish Judiciary as an entity capable of producing legitimate rulings.

The Case

In October of 2021, the politically stacked Polish Constitutional Tribunal ruled that EU law did not have primacy over the Polish Constitution. This ruling came after the Polish government requested the Tribunal to interpret the Polish Constitution. As such, the ruling has challenged a foundational principal of EU law and a longstanding cornerstone of the integration process.

In 1964, (*Costa V. ENEL*), the European Court of Justice (ECJ) ruled that that member states' institutions cannot give precedence to domestic measures over Community laws (Amedeo, 2019, p. 1030). The ECJ figured that if countries could overrule EU laws at will, Europe would devolve into a patchwork of different, incompatible, systems and the process of integration would collapse. The supremacy of EU law over national law ensures a consistent legal environment across the Union and has been the cornerstone of European integration ever since.

The ECJ ruled in this manner to ensure that the actions of member states did not result in discrimination due to nationality. In essence, member states could not implement policies that would jeopardize the rules established by the community. The precedent established by *Costa V. ENEL* means that the actions of the PiS regarding the Polish Judiciary are illegal and in contravention to EU Law. Even prior to the 2021 Constitutional Tribunal's ruling, the primacy of EU law was already being violated. Furthermore, the ruling of the Constitutional Tribunal marks the first time that the legitimacy of this principal has been directly questioned by a constitutional court (Euronews, 2021). The Constitutional Tribunal ruled that Polish judges should not use EU law when questioning the independence

of other judges (BBC, 2021). The interpretation of the Constitutional Tribunal means that Polish judges may no longer apply EU law in domestic cases or refer cases to the ECJ.

The ruling of the Constitutional Tribunal frees the Polish government not only from the constraints of Polish law, now undermined by a partisan judiciary, but also from the constraints of EU law, which Polish judges can no longer use to challenge the government. This act has constituted the most blatant transgression by Warsaw towards the rule of law in Europe.

The Conflict

The destruction of Poland's judicial independence threatens the integrity of the European Union and the rights and freedoms of the Polish People. The unfortunate reality of the crisis is that regardless of each side's actions, the people of Poland and the Citizens of the EU are going to be the ultimate losers. Brussels is threatening to withhold €36 Billion in Covid-19 recovery funds earmarked for Poland, a sum that Poland sorely needs (Wanat, Tamma, & Bayer, 2021). However, the conditions laid out by Brussels would strike at the heart of the PiS' domestic legitimacy.

Brussels is demanding that Warsaw undo its changes to the Polish Judicial system. The PiS has built the reputation of a party that is the protector of conservative Polish values, supportive of Polish nationalism and willing to stand up to the meddling of Brussels bureaucrats. The PiS is unlikely to accept the demands of Brussels due to the domestic ramifications. Backtracking would make the PiS look weak and cause the party to lose support; moreover, conceding to the EU undo the effort the PiS' has made in consolidating power in the country. The PiS government needs to maintain its image as a "strongman", making compromise with Brussels almost impossible to attain.

Commission President Von Der Leyen has been committed to using dialogue since coming to power in 2019. However, Poland has taken the opportunity for dialogue to delay further enforcement regarding the conflict within the Judiciary. The recent de-facto exit of Poland from the EU's legal order has forced the Commission to act due to

the untenability of the situation regarding the primacy of EU law. With a ruling from the European Court of Justice, the Commission has fined Poland €1 million a day for disregarding the Primacy of EU law (Euronews, 2021). Whether Poland pays this fine is to be seen; however, it looks unlikely that Poland will change its behaviour due to this single fine.

This dispute could fracture the very foundations of the EU, and each party has passed the point in which a mutually beneficial resolution could have been found. Giving in to Brussels would require the PiS to lose its grip on the Judiciary and damage to its domestic popularity. Concurrently, Brussels cannot allow Poland to disregard the EU's primacy; moreover, every day that Poland is allowed to disregard its treaty commitments undermines the legitimacy of the EU. Both Warsaw and Brussels have powerful weapons at their disposal to pursue their interests; however, the power of these tools comes from their ability to pressure the constituency of the opposing party. There will be no clear winner of this dispute but what is clear is that the true losers will be the people of Poland and the EU.

The People

Warsaw and Brussels have sent each other a myriad of threats trying to persuade the other party to concede. However, the unfortunate reality of this dispute is that the Polish people and citizens of the EU will shoulder the brunt of any action taken. The EU is threatening to hold off approving €23 Billion in grants and a further €34 billion in loans to the Polish government due to its refusal to comply with its treaty commitments and its questioning of EU primacy (France 24, October 2021). In response, the Polish government, with the Hungarian government's support, has threatened to veto the Council on major European initiatives such as climate change. The people of Poland need the funds designated for their country to recover from COVID-19. Furthermore, the EU needs the support of Poland to address major issues through their support on the Council.

The repercussions of the EU's economic pressure will be felt chiefly by the people of Poland rather than the political leadership. Moreover, it will not be the lawmakers, leaders and bureaucrats in Brussels that will feel the adverse effects

of Poland's veto on the Council. The ultimate losers will be the citizens of the EU, who will have to endure the consequences of a Council deprived of consensus on major issues. While the conflict between Warsaw and Brussels continues, citizens across Europe will pay the price.

Polexit?

The ruling of the Constitutional Tribunal sent shockwaves across the EU, and effectively detached Poland, illegitimately, from the EU legal system. Most troubling is that on November 3rd another round of Judicial reforms were announced by the Polish government. These reforms would remove the highly controversial DC of the Supreme Court but also all of the court's existing five chambers as well (Shotter, 2021). The Polish government is planning on replacing these five chambers with two new chambers and in doing so removing the last remaining legally appointed justices on the court. This proposed reform is another act by the Polish government to illegitimately exert its influence over the judiciary. In essence, the Polish government has chosen to escalate the disagreement further despite the impossibility of their current position.

The Polish government has put itself on collision course with EU, through non-other than its own actions. If the Polish government is looking for an exemption from EU law than it will be disappointed. The EU is built upon a foundation of a mutual agreement regarding the primacy of EU law. Brussels will not give Warsaw a concession regarding the primacy of EU law. As Hall (2020) puts it, "...one person's carve out is another one's hole. Soon the EU's legal order will be full of them" (para. 11). A concession of this scale would destroy the European project, which is precisely what the justices in *Costa v. ENEL* were trying to avoid when they produced their landmark ruling. Brussels will not stand down in this fight, especially since a founding EU principle is at stake.

Polexit, a Polish exit from the EU, is the worst possible outcome of this dispute and one which neither Brussels nor the people of Poland want. What makes the case of Poland different from Brexit is that its the actions and sentiments of those in the highest levels of the Polish government, not the people, who are pushing the country away from

the EU (Guerra, 2021). Most Poles support the EU and are furious at the PiS government for putting Poland in its current predicament. A Eurobarometer survey in June and July revealed that almost double the number of poles trust the EU as trust the Polish government (Aljazeera, 2021). The Polish Government has said that it does not want to leave the EU but its policies speak otherwise. A Polesxit, though unlikely, is not outside the realm of possibility, and the Polish government should be cautious of not putting its country in a situation where it forced to Polesxit by accident.

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