addressee are hard to measure. Whatever the costs are, they are likely to be paid by the court itself and not by the government.

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Poland—Another episode of "rule of law backsliding"—Judgment P 7/20 and a threat to the integrity of the EU legal order

Constitutionality; EU law; Interim relief; Judgments and orders; Judiciary; Poland; Rule of law

Since 2015, Poland's Prawo i Sprawiedliwość (PiS) Government has engaged in a process of "rule of law backsliding" (hereafter "backsliding") whereby it has deliberately eroded checks and balances with the aim of entrenching itself in power.[1] Since then, the regime has inter alia eradicated effective judicial review by subordinating the Constitutional Tribunal to its will and introduced a disciplinary regime through the creation of the Disciplinary Chamber of the Supreme Court, tasked with sanctioning judges criticising the PiS' judicial reforms or failing to adjudicate in line with the government's agenda.[2] In so doing, the regime has persistently undermined judicial independence by increasing the control of the legislative and executive branches on the functioning and "outputs" of the judiciary.[3] The purpose of this essay is to illustrate how the most recent iteration of Polish backsliding—through the judgment of the Constitutional Tribunal in case P 7/20—threatens the integrity of the EU's legal order and, in turn, the future of the EU itself.

Prelude: The April 2020 interim relief order

Functional legal systems require inter alia authority, consistency, and compliance[4]: laws must be respected and their interpretations uniform. It would be questionable whether a particular system is capable of issuing authoritative and binding laws if this were not the case. Accordingly, we may notice why backsliding poses a challenge to the integrity of the EU's legal order, and why the Court of Justice has found violations of judicial independence contrary to EU law.

consulta, pero … con otra pregunta", *El Financiero*, 2 October 2020, *https://www.elfinanciero.com.mx/nacional/corte-aprueba-la-consulta-pero-sin-dedicatoria-a-los-expresidentes/* [Accessed 13 October 2021]; "La pregunta de la encuesta a expresidentes quedó en términos vagos", *El Financiero*, *https://www.elfinanciero.com.mx/tv/la-nota-dura/la-pregunta-de-la-encuesta-a-expresidentes-quedo-en-terminos-vagos-iij-unam/* [Accessed 13 October 2021].

[1] Laurent Pech and Kim Lane Scheppele, "Illiberalism Within: Rule of Law Backsliding in the EU" (2017) 19 C.Y.E.L.S. 3, 10.

[2] Commission, 2020 Rule of Law Report: Country Chapter on the rule of law situation in Poland (communication) SWD/2020/320 final.

[3] Commission, 2019 European Semester: Country Report Poland 2019 (communication) SWD/2019/1020 final, p.42.

[4] Hans Kelsen, *General Theory of Law and State*, Translation by Anders Wedberg (Cambridge, Massachusetts: Harvard University Press, 1945), p.119; Justin Lindeboom, "The Autonomy of EU Law: A Hartian View" (2021) 13 Eur. J. Legal Stud. 271, 282; Roland Bieber and Francesco Maiani, "Enhancing Centralized Enforcement of EU Law: Pandora's Toolbox?" (2014) 51 C.M.L. Rev. 1057, 1057–1058.

For our purposes, the most relevant judgment was issued in April 2020 where, in its interim relief order, the court required the suspension of legislative provisions allowing the Disciplinary Chamber to adjudicate in disciplinary proceedings concerning judges.[5] The court grounded its injunction by reference to the second paragraph in art.19(1) TEU, requiring Member States to "provide remedies sufficient to ensure effective legal protection in the fields covered by Union law". Because national courts are tasked with the enforcement of EU law and—as EU courts themselves—are responsible for the protection of individuals' rights under EU law, they would have to be independent and impartial as otherwise they could not effectively provide such protection.[6] In other words, the court found measures undermining judicial independence—such as those precluding judges from applying EU law correctly via the threat of disciplinary proceedings—contrary to EU law.

However, in response, the Disciplinary Chamber directed a petition to the politicised Constitutional Tribunal asking it to assess whether interim relief orders relating to the structure and functioning of the judiciary in a Member State were contrary to the Polish Constitution, in so doing putting into question the court's authority and jurisdiction.

The damage of P 7/20

On the 14 July 2021 the Constitutional Tribunal gave its judgment in the P 7/20 case. Relying in particular on the jurisprudence of the Bundesverfassungsgericht,[7] it stated that while EU law is supreme, this could not be the case when provisions of EU law were enacted outside of the competences bestowed on the EU.[8] Otherwise, it argued, the Court of Justice would possess an unrestrained ability to expand the scope of EU law beyond what is permissible under the principle of conferral. It therefore deemed it necessary to assess whether the Court of Justice—in its April 2020 interim relief order—acted ultra vires.

In its reasoning, the tribunal highlighted that the competence to create a judicial structure which ensures the protection of rights under EU law is reserved for Member States.[9] Furthermore, it emphasised that it is for the Republic of Poland, as a sovereign state, to regulate the rules governing the functioning and operation of its judicial system; since it is the Constitutional Tribunal that is tasked with reviewing the Constitution, it is for this body to have the final say over the propriety of changes to the structure of its judiciary. Therefore, in requiring the suspension of legislative provisions concerning the functioning and operation of a judicial organ in Poland, the Constitutional Tribunal found the Court of Justice to have acted in a (domestic) constitutional capacity which constituted an overreach of its competences in a "clear" (*wyraźny*) and "significant" (*istotny*) manner.[10] In other

[5] *Commission v Poland* (C-791/19R) EU:C:2020:277.

[6] *Commission v Poland* EU:C:2020:277 at [30]–[35]. See also Aleksandra Kustra-Rogatka, "The Rule of Law Crisis as the Watershed Moment for the European Constitutionalism" (*Verfassungsblog*, 14 November 2019), *https://verfassungsblog.de/the-rule-of-law-crisis-as-the-watershed-moment-for-the-european-constitutionalism/* [Accessed 14 October 2021].

[7] BVerfG, Judgment of the Second Senate of 5 May 2020, 2 BvR 859/15.

[8] Constitutional Tribunal, "Komunikat Po [communication following the judgment]", *https://trybunal.gov.pl/postepowanie-i-orzeczenia/komunikaty-prasowe/komunikaty-po/art/11588-obowiazek-panstwa-czlonkowskiego-ue-polegajacy-na-wykonywaniu-srodkow-tymczasowych-odnoszacych-sie-do-ksztaltu-ustroju-i-funkcjonowania-konstytucyjnych-organow-wladzy-sadowniczej-tego-panstwa* [Accessed 14 October 2021].

[9] Article 19(1) TEU.

[10] See also BVerfG, Judgment of the Second Senate of 5 May 2020, 2 BvR 859/15 at [110].

words, the Constitutional Tribunal found such interim relief orders to be ultra vires and contrary to the Constitution. It therefore held that—although it could not affect the validity of provisions of EU law directly as this is a task reserved solely for the Court of Justice—such provisions would have to be deprived of supremacy and direct applicability in the Polish legal sphere.

The tribunal's reasoning is certainly questionable from an EU law perspective. The Court of Justice was clear in that it was not giving itself the power to regulate the functioning of domestic judiciaries in an expansive sense, but that it was merely ensuring that Member States respected EU law even when acting in the context of their sole competences.[11] Therefore, while the control over the structure and functioning of a domestic judicial system remains with the Member States, this does not equate to the provision of a *carte blanche*. Even acting in the context of sole competences, Member States must respect and cannot undermine the EU's goals as required through the duty of sincere cooperation.[12] If Member States could stray from their obligations under EU law, this would inevitably render the entire legal framework of the EU redundant: there is no point in having rules governing the functioning of a system if they are not followed. This consideration brings us to the crux of the matter.

At the EU level we can point to the concepts of autonomy and supremacy as facilitative of the EU's capacity to create binding and authoritative rules within its legal space.[13] The former dictates that the EU's legal system operates independently of national and international law, setting its own legal rules which must be respected in its own legal sphere.[14] This is complemented by the concept of supremacy, which requires that provisions of domestic law cannot counteract EU law, and therefore must be disapplied in the event of a clash.[15] Bearing this in mind, the damage of P 7/20 becomes evident.

By depriving interim relief orders concerning the functioning of the Polish judiciary of applicability, the Constitutional Tribunal explicitly curtailed the scope of application of EU law in the Polish legal sphere. Accordingly, the process of backsliding—and the subsequent erosion of judicial independence—is leading to dysfunction in the EU's legal order. Namely, for the EU's legal order to persist, the EU needs to ensure that *it* is the one to define its laws (in line with the concept of autonomy), and that its laws and their interpretations or validity cannot be undermined at the domestic level (in line with the concept of supremacy).[16] Pech has therefore aptly described the deterioration in Poland as leading to "EU-legal-disintegration".[17] The EU can hardly possess a functioning legal order

[11] *Commission v Poland* EU:C:2020:277 at [36].

[12] Article 4(3) TEU.

[13] See Joseph H.H. Weiler, "The Transformation of Europe" (1991) 100(8) Yale L.J. 2403, 2413–2419; Lindeboom, "The Autonomy of EU Law: A Hartian View" (2021) 13 Eur. J. Legal Stud. 271, 277–279, 282.

[14] *Van Gend en Loos v Nederlandse Administratie der Belastingen* (26/62) EU:C:1963:1; [1963] E.C.R. 1. More recently, see *CETA Investment Court System (Belgium)* (Opinion 1/17) EU:C:2019:341; [2019] 3 C.M.L.R. 25 at [109]–[111].

[15] *Flaminio Costa v ENEL* (6/64) EU:C:1964:66; [1964] E.C.R. 585.

[16] See *Prokuratura Rejonowa w Mińsku Mazowieckim v WB* (C-748/19 to C-754/19) EU:C:2021:403, opinion of Advocate General Bobek at [138]; Bieber and Maiani, "Enhancing Centralized Enforcement of EU Law: Pandora's Toolbox?" (2014) 51 C.M.L. Rev. 1057, 1057–1058.

[17] Laurent Pech, "Protecting Polish Judges from Political Control" (*Verfassungsblog*, 20 July 2021), *https://verfassungsblog.de/protecting-polish-judges-from-political-control/* [Accessed 14 October 2021].

if the decisions of its court are not respected or if the rules upon which it is based are not adhered to.

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Singapore—Can delaying an execution due to COVID-19 amount to unconstitutional discrimination?

LT Constitutionality; Coronavirus; Death penalty; Delay; Discrimination; Execution; Foreign nationals; Nationality; Pandemics; Singapore

Syed Suhail bin Syed Zin, a convicted drug trafficker, was due to be executed on 18 September 2020. Two days before that, he applied for leave to commence judicial review proceedings challenging the timing of his execution. This began what has turned out to be a leading case on equality law in Singapore.

Syed Suhail (a Singapore citizen) alleged that there were foreigners who had been sentenced to death before he had been, yet were scheduled to be executed later than he would be. He claimed that their executions were delayed because COVID-19 restrictions "prevented their family members from entering Singapore [to visit them] and the repatriation of their remains".[1] This, he said, violated art.12(1) of the Constitution ("All persons are equal before the law and entitled to the equal protection of the law"), and resulted in nationality discrimination contrary to art.12(2) ("there shall be no discrimination against citizens of Singapore on the ground only of religion, race, descent or place of birth").

It appears that Syed Suhail's aim was to gain time to gather evidence with which he could, in what is known as a "review application",[2] petition the Court of Appeal to review his conviction on the basis of an alleged miscarriage of justice.[3] Indeed, on 17 September 2020—the same day on which the High Court dismissed Syed Suhail's leave application—Syed Suhail filed such a review application. The same day, he appealed against the High Court's decision on his leave application.

The Court of Appeal rejected the review application.[4] However, it saw potential merit in the judicial review leave application (putting aside the issue of its practical utility). According to the Court of Appeal, art.12(1) requires that those who are "equally situated" not be treated differently except where "legitimate reasons" exist.[5] So, *ceteris paribus*, death row prisoners must be executed in the order in which they have been sentenced to death. Another prisoner, Datchinamurthy a/l Kataiah, had been sentenced to death earlier than Syed Suhail, yet no date for his execution had been fixed.[6] On this basis, the Court of Appeal granted leave to apply for judicial review.

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[1] *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 CA at [7].
[2] Criminal Procedure Code ss.394F-394K.
[3] *Syed Suhail* [2021] 1 SLR 809 at [7(a)], [68].
[4] *Syed Suhail* [2021] 1 SLR 159 CA. The Court of Appeal also ordered that Syed Suhail's counsel be personally liable for the Public Prosecutor's costs: *Syed Suhail* [2021] 2 SLR 377 CA especially at [25]–[30].
[5] *Syed Suhail* [2021] 1 SLR 809 at [62] (emphasis omitted).
[6] *Syed Suhail* [2021] 1 SLR 809 at [75].

