

A Mimicry of International Law Compliance: How the Abusive Interpretation of International Norms Serves Poland's Illiberal Regime

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Abstract

In recent years, the instrumental use of international norms to entrench abusive rule has been a strategy increasingly utilized by democratically regressing European states. This pattern is evident in Poland in particular, where captured democratic institutions have attempted to legitimize unconstitutional reforms of the justice system by asserting their consistency with international law. To provide an insight into this illiberal strategy, this Essay uses the concept of mimicry as a framework to study recent judgments by the Polish Constitutional Tribunal. This Essay argues that the Polish Constitutional Tribunal feigns legal compliance by abusively interpreting well-established concepts of international law. The Essay concludes by outlining the role that international law machinery can play in combating mimicry on the national level. Examining recent decisions of the European Court of Justice that have pushed back against the Polish decline, it explores what solutions may be feasible within the European Union framework, maintaining European institutions' capacity to root out abuses of international law.

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I. INTRODUCTION: MIMICRY

Illiberal regimes in Central and Eastern Europe¹ deploy various methods to legitimize their actions and entrench their rule.² In Poland, where the government has managed to capture the highest courts and partially pack them with politicized judges willing to support unconstitutional reforms of the justice system,³ these insidious practices have recently become even more refined. In particular, the Polish government strategically attempts to bolster its antidemocratic rhetoric by claiming that its actions are consistent with binding European laws. Unfortunately, the ongoing dialogue between Polish authorities and European Union (E.U.) institutions over Poland's declining rule of law has not managed to effectively counter the Polish government's false narrative of international law compliance, resulting in an overall failure to limit the country's democratic backsliding.

This Essay seeks to provide an explanation for how Polish illiberal governance has managed to remain immune to European interventions and, despite those interventions, followed through with many pernicious legal and institutional changes. Accordingly, it undertakes an in-depth analysis of Poland's current relationship with international law. In particular, it relies on the notion of mimicry as a framework for deconstructing the Polish method of faking international law compliance. The issue of regime type classification and the precise internal dynamics within the distorted Polish legal framework constitute the subject of many insightful legal studies. In lieu of examining those issues, this analysis turns directly to authoritarian actions as illustrative examples permitting profound engagement with the Polish illiberal strategy.⁴

Mimicry refers to “use by authoritarians of institutions that originate in democracy—for example, elections, judges with some degree of autonomy, counter-corruption commissions and long lists of rights” to benefit the regime in power.⁵ Essentially, mimicry involves the use of democratic institutions for illiberal purposes.

¹ Including those in Poland, Hungary, and Romania. Following the substantive body of literature, this Essay refers to Polish governance also in terms of authoritarianism. See PIPPA NORRIS & RONALD INGLEHART, CULTURAL BACKLASH: TRUMP, BREXIT, AND AUTHORITARIAN POPULISM 245–48 (2019); Tímea Drinóczi & Agnieszka Bień-Kacala, *Illiberal Constitutionalism and the European Rule of Law*, in RULE OF LAW, COMMON VALUES, AND ILLIBERAL CONSTITUTIONALISM: POLAND AND HUNGARY WITHIN THE EUROPEAN UNION 26 (Tímea Drinóczi & Agnieszka Bień-Kacala eds., 2021); Gabor Halmai, *Populism, Authoritarianism and Constitutionalism*, 20 GERMAN L.J. 296 (2019).

² See Gabor Halmai, *Illiberalism in East-Central Europe*, in ROUTLEDGE HANDBOOK OF ILLIBERALISM 816–19 (András Sajó, Renáta Uitz, & Stephen Holmes eds., 2022) [hereinafter ROUTLEDGE HANDBOOK].

³ See Wojciech SADURSKI, POLAND'S CONSTITUTIONAL BREAKDOWN 58 (2019); Kim Lane Sheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 553, 549–583 (2018).

⁴ See Marlies Glasius, *Illiberal Practices*, in ROUTLEDGE HANDBOOK, *supra* note 2, at 339.

⁵ See TOM GINSBURG, DEMOCRACIES AND INTERNATIONAL LAW 193 (2021).

When analyzing European democratic backsliding, scholars have often turned to the concept of mimicry to establish a relationship between populism and constitutionalism. They posit that populists rely on the language of constitutionalism to create a constitutional “counter-narrative,” an alternative reading of established concepts of constitutionalism that enable them to achieve their political goals.⁶ In Poland’s case, the current regime has attempted to create such a “counter-narrative” by partially packing the country’s highest courts and capturing the National Council of the Judiciary, forcing these institutions to formally mimic their democratic equivalents.⁷ Therefore, the situation in Poland falls into the scope of abuse of domestic legal institutions, defined in such terms.

But a domestic mimicry-based explanation does not sufficiently describe the circumstances of Poland’s legal framework. Recently, the main objective of the Polish government has been to defend its judiciary reforms in the face of international pressure to abide by the law, using the captured courts to convey its message. Therefore, to grasp the concept of mimicry in its Polish variation, we need to shift our attention to the supranational level. Essentially, Polish mimicry can be understood as a pattern of actions performed by captured democratic institutions, aimed at convincing onlookers that the state’s unconstitutional and anti-European legislation is in conformity with international law.

Among the manifold and rigorous methodologies developed to classify and respond to democratic regression in Central and Eastern Europe,⁸ it may seem that the theory of mimicry offers just one more way of approaching the backsliding phenomenon. But, for several reasons, the mimicry framework introduced in this Essay is especially useful in the Polish context.

First, the Polish regime’s recent illiberal rhetoric has been particularly weighty and influential. Importantly, the Polish government has managed to capture the country’s essential judicial institutions, thereby relocating the source and elevating the authority of its illiberal mimicking argument. Its apparatus for feigning consistency with international law is now quite robust, including the captured Constitutional Tribunal, the partially packed Supreme Court,⁹ and the

⁶ See GIUSEPPE MARTINICO, FILTERING POPULIST CLAIMS TO FIGHT POPULISM: THE ITALIAN CASE IN A COMPARATIVE PERSPECTIVE 11 (2021).

⁷ See GINSBURG, *supra* note 5, at 193–95.

⁸ See Kim Lane Scheppele, *Enforcing the Basic Principles of EU Law through Systemic Infringement Actions*, in REINFORCING RULE OF LAW OVERSIGHT IN THE EUROPEAN UNION 101–03 (Carlos Closa & Dimitry Kochenov eds., 2016); Laurent Pech, Patryk Wachowiec & Dariusz Mazur, *Poland’s Rule of Law Breakdown: A Five-Year Assessment of EU’s (In)Action*, 13 HAGUE J. RULE L. 1, 38–40 (2021). See generally DEFENDING CHECKS AND BALANCES IN EU MEMBER STATES: TAKING STOCK OF EUROPE’S ACTIONS (Armin von Bogdandy et al. eds., 2021).

⁹ Both the Disciplinary Chamber and the Chamber of Extraordinary Review and Public Affairs within the Polish Supreme Court have been packed with politicized judges.

government-appointed National Council of the Judiciary.¹⁰ The government's takeover of these democratic institutions was made possible by its adoption of numerous laws—all of which flagrantly violated the Polish Constitution—that worked to incrementally dismantle the Polish justice system.¹¹ Now that the highest courts are politically controlled, they themselves validate the government's new reforms, progressively consolidating the current regime. The fact that Poland's courts are now a major source of its illiberal and anti-European message renders it difficult to detect the true, insidious objective of their rulings.

Second, there is a dualism perpetually present in the Polish legal order and reflected in the Polish-European dialogue. This dualism involves, on the one hand, adjudication by politically controlled judges appointed by the new National Council of Judiciary, the Constitutional Tribunal, and the Supreme Court, applying the unconstitutional laws that make up the Polish illiberal regime. On the other hand, it also involves the activity of independent judges relying on European standards of judicial impartiality and independence to question the composition of the captured courts.¹² The split between these two co-existing legal orders makes understanding the Polish status quo and the Polish-European exchange even more challenging.

Finally, the Polish government has clearly become aware that “the more brutal forms of intimidation are best replaced with more subtle forms of coercion.”¹³ As a result, Polish authorities are increasingly engaging in sophisticated discourse involving references to fundamental concepts and values of constitutional and international law. Illiberal rhetoric endorsed by judicial authorities conflates the constitutional concepts with one another, often altering their established understanding. This strategy allows those in power to hide their true objectives behind the persuasive language of international law to follow through with further legal reforms that subvert the core of liberal democracy. It may thus be difficult to differentiate between an innovative decision by the government “directed toward the preservation of democracy” and an act that poses a threat to it.¹⁴

This rhetoric of compliance with international law norms complements the notion of mimicry as deployed recently by Polish institutions. It will become evident when looking at the case law that the captured Polish Constitutional Tribunal invokes international legal concepts to substantiate its claims, using

¹⁰ See SADURSKI, *supra* note 3, at 99.

¹¹ See Wojciech Sadurski, *How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding*, 2018 REVISTA FORUMUL JUDECATORILOR 104 (2018).

¹² See Pech et al., *supra* note 8, at 14.

¹³ Gabor Halmai, *Legally Sophisticated Authoritarians: The Hungarian Lex CEU*, VERFASSUNGSBLOG (Mar. 31, 2017), <https://perma.cc/2UMF-Y2FL>.

¹⁴ GINSBURG, *supra* note 5, at 141.

distorted interpretations of international law to fake the consistency of the government's newly enacted laws with international standards. Essentially, it is via abusive interpretation of established international legal concepts that Polish courts perform mimicry.

Before moving on to the examples of mock international law compliance, the following distinction is essential. This Essay does not maintain that international laws per se serve to entrench Polish authoritarian rule. As the following examples show, it is only when international law concepts are abused through perverted interpretation by politically captured judicial bodies that international law indirectly and unwillingly contributes to the consolidation of the Polish regime.

II. ABUSIVE INTERPRETATION OF INTERNATIONAL LAW IN POLAND

Having outlined Poland's method of feigning international law compliance, this Part explores the precise mechanism by which it is effectuated. Recent judgments of the Polish Constitutional Tribunal¹⁵ provide enlightening illustrations of how reliance on a distorted and instrumental understanding of international legal concepts contributes to the institutionalization of illiberal reforms and the overall entrenchment of authoritarian rule. Understood in terms of abusive interpretation of established concepts and ideas belonging to international law, mimicry can turn to various structures present in the international legal order. However, judgments of the Polish Constitutional Tribunal demonstrate clear patterns. The Tribunal frequently cites the values of constitutional and national identity, as well as the primacy of E.U. law, when examining the conformity of domestic legislation with international obligations, attaching its own distorted understanding to these notions. The Tribunal's interpretations, which are fundamentally contrary to the essence of the international law concepts, repurpose international norms for illiberal ends.

The following Subsections examine four recent cases from the Polish Constitutional Tribunal that exemplify this phenomenon. Two of the cases interpret domestic legislation's relationship to E.U. law, while the others do the same in relation to the European Convention on Human Rights (ECHR).

A. Abusive Reading of the E.U. Principle of National Identity

The first important case providing an example of abusive interpretation of international law by the Polish Constitutional Tribunal, concerned the Polish

¹⁵ Even though this Essay speaks of "judgments" of the Polish Constitutional Tribunal, it should be remembered that the unlawfully presided over and composed Tribunal is no longer considered to provide effective constitutional review. See Pech et al., *supra* note 8, at 7; Malgorzata Gersdorf & Mateusz Pilich, *Judges and Representatives of the People: A Polish Perspective*, 16 EUR. CONST. L. REV. 345, 356 (2020).

disciplinary system for judges. A 2018 law provided for a disciplinary regime for judges that enabled punishments based on the content of their judicial decisions.¹⁶ The scope of this legislation was broadened in 2019, when the newly adopted provisions of the so-called “muzzle law” prohibited judges from relying on the E.U. laws concerning judicial independence.¹⁷ Under both enactments of the law, the Disciplinary Chamber of the Polish Supreme Court administered the penalizing procedures.

In October 2019, the European Commission initiated action against Poland concerning this disciplinary regime for judges.¹⁸ Soon afterwards, the European Court of Justice (ECJ) instituted interim measures ordering the suspension of the functioning of the Disciplinary Chamber.¹⁹

Unwilling to comply with the injunction, the Disciplinary Chamber launched proceedings before the Polish Constitutional Tribunal, asking it to rule whether the ECJ was acting within its competence when suspending the Chamber’s activities. In July 2021, the Tribunal ruled that the Chamber did not have to comply with the interim measures ordered by the ECJ because they were inconsistent with the Polish Constitution.²⁰ In arriving at this verdict, the Tribunal relied on the principle of national identity, stating that the ECJ’s interim measures “clearly interfere with the scope of domestic constitutional regulation, thus violating Polish constitutional identity, of which the Polish judiciary is an integral part.”²¹ The Tribunal also noted that, while it fully respects the institutional role of the ECJ as a court empowered to interpret E.U. law, such interpretation must be within the competence transferred, and must respect the constitutional identity and fundamental functions of the state.²² According to the Tribunal, the numerous rulings of the ECJ concerning Poland did not respect this principle.²³

It is discernible that the notion of constitutional identity applied by the Tribunal was selective and instrumental.²⁴ This is especially visible when compared with Article 4 of the Treaty on the European Union, which constitutes the legal

¹⁶ For more details on the content of the “muzzle law,” see Pech et al., *supra* note 8, at 14; Fryderyk Zoll & Lena Wortham, *Weaponizing Judicial Discipline: Poland*, in DISCIPLINING JUDGES: CONTEMPORARY CHALLENGES AND CONTROVERSIES 290 (Richard Devlin & Sheila Wildeman eds., 2021).

¹⁷ Pech et al., *supra* note 8, at 3.

¹⁸ *See generally* Case C-791/19, Comm’n v. Poland, ECLI:EU:C:2021:596 (Jul. 15, 2021).

¹⁹ *See generally* Case C-791/19, Comm’n v. Poland, ECLI:EU:C:2020:277 (Apr. 8, 2020).

²⁰ Judgment of Constitutional Tribunal of Republic of Poland of Jul. 14, 2021, P 7/20, 14 VII 2021.

²¹ *Id.* ¶ 6.8 (author’s translation).

²² *See id.* ¶ 8 (author’s translation).

²³ *See id.*

²⁴ For a similar example of the abusive interpretation of constitutional identity performed by the Hungarian Constitutional Court, see Gabor Halmai, *The Hungarian Constitutional Court and Constitutional Identity*, VERFASSUNGSBLOG (Jan. 10, 2017), <https://perma.cc/BRY8-5VN2>.

basis for the E.U. principle of constitutional identity. The Article's second paragraph obliges the Union to respect the national identities of the member states.²⁵ The third paragraph, however, lays out the boundaries of member states' admissible reliance on their constitutional identities, by obliging them to comply with the principle of sincere cooperation.²⁶ In essence, the correct understanding of respect for national constitutional identity pairs protection for states with corresponding obligations, requiring domestic action to remain compatible with the doctrine of sincere cooperation.²⁷ The Polish Constitutional Tribunal, conversely, found that European institutions are only entitled to rely on a state's sincere cooperation if they respect the Polish constitutional identity. Such interpretation paves the way for systemic abuse of the notion of national identity, hollowing out its liberal constitutional content²⁸ as developed within European practice.

B. Abusive Reading of the Principle of Primacy of the E.U. Law

In 2021, a judgment of the ECJ found Poland's new national system of judicial appointment inconsistent with the European legal order.²⁹ It stated that the Polish judiciary should disregard the national provisions in reliance on the principle of primacy of E.U. law,³⁰ under which member states and their authorities are obliged to resolve conflicts of norms by giving priority to E.U. law to the greatest possible extent.³¹ Dissatisfied with this ruling, Polish Prime Minister Mateusz Morawiecki submitted a motion to the Polish Constitutional Tribunal, essentially asking it to assess the competence of the ECJ to review the

²⁵ Paragraph 2 stipulates that “[t]he Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.” Consolidated Version of the Treaty on European Union art. 4(2), Feb. 7, 1992, 2012 O.J. (C 326/18).

²⁶ Paragraph 3 states that “[p]ursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.”

²⁷ See R. Daniel Kelemen & Laurent Pech, *Why Autocrats Love Constitutional Identity and Constitutional Pluralism: Lessons from Hungary and Poland* 18–21 (Reconnect, Working Paper No. 2, 2018).

²⁸ See Kim Lane Scheppele, Professor, Princeton U., *Worst Practices and the Transnational Legal Order (Or How to Build a Constitutional ‘Democratorship’ in Plain Sight)*, Lecture at the University of Toronto (Nov. 2016).

²⁹ See generally C-824/18, *A.B. & Others v. Krajowa Rada Sadownictwa & Others*, ECLI:EU:C:2021:153.

³⁰ See Judgment of the Constitutional Tribunal of the Republic of Poland of May 11, 2005, K 18/04, 11 V 2005; Stanisław Biernat & Ewa Łętowska, *This Was Not Just Another Ultra Vires Judgment! Commentary to the Statement of Retired Judges of the Constitutional Tribunal*, VERFASSUNGSBLOG (Oct. 27, 2021), <https://perma.cc/W8JK-83YL>.

³¹ See C-824/18, *A.B. & Others v. Krajowa Rada Sadownictwa & Others*, ECLI:EU:C:2021:153 ¶ 167.

independence and impartiality of the Polish judiciary.³² In a judgment released in October 2021, the Tribunal considered Morawiecki's motion against the backdrop of the principle of primacy, in another case particularly illustrative of Poland's abusive interpretation of international norms.³³

By subverting the meaning of the principle of primacy, the Tribunal found a general and absolute precedence of the Polish Constitution over E.U. law and ignored previous judgments in which the issue of possible collision between domestic and international legal orders was already addressed.³⁴ It held that Articles 1 and 19 of the Treaty on the European Union are inconsistent with the Polish Constitution. From that, it concluded that when European institutions review Polish standards of judicial independence and impartiality, they act beyond the limits of their competence.³⁵

The key thing to understand about this case, however, is that there was no real contradiction between the Polish Constitution and E.U. law that required the Tribunal to interpret of the principle of primacy. This purported conflict of norms was artificially created by the Tribunal so that it could find E.U. law unconstitutional—and thereby prohibit Polish judges from relying on European standards of judicial independence to question the judicial appointment procedures of the National Council of the Judiciary. This would further enable to challenge the composition of captured courts. The alleged contradiction of norms and the resulting declaration of the unconstitutionality of E.U. law were a mere excuse to prohibit the overruling of the domestic legislation. At the same time, the Tribunal's reliance on the principle of primacy and its distorted interpretation enabled this end. Ultimately, an alternative reading of one of the E.U.'s most established concepts served to achieve the Polish government's illiberal aim of withdrawal from compliance with binding international obligations.

C. Abusive Reading of the European Convention on Human Rights

The following cases shift to the system of the ECHR and concern the consistency of the ECHR's provisions with the Polish Constitution. In the first judgment, handed down in November 2021, the Tribunal applied a novel interpretation of ECHR Article 6 and found the provision incompatible with the

³² See Judgment of the Constitutional Tribunal of the Republic of Poland of Oct. 7, 2021, K 3/21, 7 X 2021.

³³ See *id.*

³⁴ See generally Judgment of the Constitutional Tribunal of the Republic of Poland of May 11, 2005, K 18, 11 V 2005; Judgment of the Constitutional Tribunal of the Republic of Poland of Nov. 24, 2010, K 32/09, 24 XI 2010.

³⁵ See generally Judgment of the Constitutional Tribunal of the Republic of Poland of Oct. 7, 2021, K 3/21, 7 X 2021 ¶ 1 a).

Constitution.³⁶ The Polish Tribunal thus once more flagrantly violated the binding international obligations. Contrary to the well-established case law of the European Court of Human Rights (ECtHR), the Tribunal held that it cannot be considered a “court” within the meaning of ECHR Article 6.³⁷ Moreover, it opined that previous judgments of the ECtHR concerning Poland wrongly found that the Polish Constitutional Tribunal falls within the scope of ECHR Article 6. It concluded that, to the extent that the Tribunal has been considered a “court” under the treaty, ECHR Article 6 is incompatible with the Polish Constitution.³⁸

The illiberal objective behind this ruling is obvious. If the Tribunal can claim that it is not a “court” under Article 6, then it can assert that it is not bound by the ECHR’s standards for judicial independence and impartiality. The Tribunal itself, presumably unwillingly, thus agreed with a message that the European institutions themselves have been trying to convey through their numerous decisions concerning Poland. The Polish Constitutional Tribunal has ceased to fulfill the European requirements of judicial independence and impartiality and cannot be considered a court according to the European standards.³⁹

In a subsequent judgment, released in March 2022, the Tribunal extended the scope of the November 2021 case by prohibiting the ECtHR from inquiring into the fair trial standards of all ordinary courts in Poland.⁴⁰ It again stated that ECHR Article 6 is incompatible with the Polish Constitution, to the extent that the ECtHR used it to scrutinize the compliance of Polish judges and the National Council of the Judiciary with ECHR standards on judicial independence and impartiality.⁴¹ This judgment provides a second example of the Polish Tribunal’s instrumental approach towards binding international laws allowing the Tribunal itself to selectively decide which ECHR provisions and ECtHR judgments deserve respect and enforcement in Poland.⁴²

In summary, it seems especially true when looking at the recent case law of the Polish Constitutional Tribunal that “democracies innovate and authoritarians mimic and repurpose.”⁴³ The recent activity of the captured Polish Tribunal

³⁶ See generally Constitutional Tribunal of Republic of Poland judgment of November 24, 2021, K 6/21.

³⁷ See *id.* ¶ 6.3.

³⁸ See *id.* ¶ 6.5.

³⁹ See Ewa Łętowska, *The Honest (though Embarrassing) Coming-out of the Polish Constitutional Tribunal*, VERFASSUNGSBLOG (Nov. 29, 2021), <https://perma.cc/HXJ9-5BEB>.

⁴⁰ See Judgment of the Constitutional Tribunal of Republic of Poland of Mar. 10, 2022, K 7/21, 10 III 2022.

⁴¹ See *Statement by Retired Judges of the Constitutional Tribunal on the Constitutional Tribunal Judgment in Case K 7/21*, VERFASSUNGSBLOG (Mar. 14, 2022), <https://perma.cc/Z6HL-HBVU>.

⁴² See Ewa Łętowska, *Ominous Coincidence of Dates*, RULE LAW POLAND (Mar. 10, 2022), <https://perma.cc/UXC4-K2SA>.

⁴³ GINSBURG, *supra* note 5, at 193 (internal citation omitted).

illustrates repeated use of abusive interpretation of international norms to serve the ends of the Polish government. The Tribunal's alternative readings⁴⁴ of the principles of national identity and primacy of E.U. law endorsed unconstitutional reforms of the Polish judiciary and have contributed to the progressive consolidation of the Polish illiberal regime.⁴⁵ Above all, the lesson to be drawn from these judgments reaches far beyond the Polish standpoint concerning the four individual legal questions subject to constitutional analysis in those rulings. Rather, they are examples of the captured Polish institutions' overall choices to ignore the obligations flowing from both E.U. law and the European system of human rights protection.

III. COPING WITH MIMICRY: SELF-DEFENSE OF INTERNATIONAL LAW

Authoritarian appropriation of international law concepts⁴⁶ and subsequent illiberal interpretation of them overturns international law's primary objective of protecting domestic legal orders from abusive regimes through interstate cooperation.⁴⁷ It is especially discernible in the above-mentioned judgments of the Polish Constitutional Tribunal that, with assistance from captured domestic institutions, the very essence of international law can easily become subverted. Reflecting upon the role of the machinery of international law in combating such instrumental use of its norms, it is still within the capacity of European institutions to push back against the entrenchment of illiberal governance and the discourse of fake international law compliance.

It appears that strong reliance on the proper interpretation of European values that have been deconstructed and abused by captured institutions offers a promising response and is feasible within the E.U. institutional framework.⁴⁸ The E.U. should defend those core values by relying on their immovable meaning, as developed within the practice of European institutions. Although the European system has been frequently critiqued for insufficiently fighting back against the decline of rule of law in Poland,⁴⁹ recent actions by the E.U. demonstrate some improvements. The ongoing process of advancing the legal tools available within the European framework to enforce compliance with international law may prove an effective strategy, especially considering the threat of financial penalty that accompanies them.

⁴⁴ See Martinico, *supra* note 6, at 18.

⁴⁵ See Pech et al., *supra* note 8 at 38.

⁴⁶ See Julian Scholtes, *Abusing Constitutional Identity*, 4 GERMAN L.J. 534, 536 (2021).

⁴⁷ See GINSBURG, *supra* note 5, at 32–33.

⁴⁸ See *id.* at 157–58.

⁴⁹ See Pech et al., *supra* note 8, at 3.

One example of a shift in Europe's approach to defending shared values is the ECJ's recent imposition of a daily penalty payment on Poland for non-compliance with the interim measures suspending the functioning of the Disciplinary Chamber of the Supreme Court. Although the Polish government insisted on the unconstitutionality of the injunction based on the Polish Constitutional Tribunal's judgment to that effect, the European Commission ordered Poland to pay €1,000,000 per day until the Chamber is dissolved.⁵⁰

Additionally, the ECJ has upheld the embedded meaning of the notion of national identity⁵¹ in a 2022 ruling concerning the E.U.'s implementation of a rule of law conditionality mechanism.⁵² This newly adopted measure established a general regime of protection of E.U. finances by conditioning payments from the E.U. budget to member states on compliance with the rule of law. The introduction of this scheme was challenged by Hungary and Poland in the ECJ, and the Court upheld the mechanism, asserting a strong defense of the E.U.'s shared values.⁵³ The court referred to the notion of national identity, stating that there are boundaries of its admissible interpretation and that any interpretation of the concept must not interfere with the constitutional identity of the E.U.⁵⁴ The ECJ thus managed to both demonstrate its opposition to the development of a distorted understanding of national identity and juxtapose this incorrect understanding with the correct interpretation of national identity—one that is consistent with the idea of European cooperation. If a state violates the rule of law by relying on its own alternative reading of the principle of constitutional identity, “the European Union cannot be criticised for implementing, in defence of its identity... the means necessary to protect that sound financial management.”⁵⁵

A 2022 ECJ case concerning Romania is yet another critical illustration of E.U. measures that may effectively hinder the Polish democratic regression.⁵⁶ In that case, a domestic constitutional court in Romania refused to give effect to a

⁵⁰ C-204/21, *Eur. Comm'n v. Poland*, ECLI:EU:C:2021:878. Up to this point, Poland has neither paid the fine nor removed the Disciplinary Chamber.

⁵¹ See Laurent Pech, *No More Excuses: The Court of Justice Greenlights the Rule of Law Conditionality Mechanism*, VERFASSUNGSBLOG (Feb. 16, 2022), <https://perma.cc/5KGJ-VVCE>.

⁵² See C-157/21, *Poland v. Eur. Parliament & Council of Eur. Union*, ECLI:EU:C:2022:98 [hereinafter *Poland v. Eur. Parliament & Council of Eur. Union*].

⁵³ See *id.* ¶ 145; Pech, *supra* note 51.

⁵⁴ The ECJ's strong reliance on the notion of constitutional identity is also important in the context of the recent legal literature calling for the abandonment of this notion due to its abuse by illiberal regimes and because of its inherently ambiguous content, which makes it susceptible to misuse. See Scholtes, *supra* note 46, at 535; Federico Fabbrini & András Sajó, *The Dangers of Constitutional Identity*, 25 EUR. L.J. 457 (2019).

⁵⁵ *Poland v. Eur. Parliament & Council of Eur. Union*, *supra* note 52.

⁵⁶ See C-430/21, *RS (Effet des arrêts d'une cour constitutionnelle)*, ECLI:EU:C:2022:99.

preliminary ruling of the ECJ based on the concept of constitutional identity. The ECJ laid out the correct understanding of both primacy and constitutional identity and pointed out that a state cannot refuse to apply E.U. law on the ground that it undermines its national identity.⁵⁷ It held that if a state finds that a provision of E.U. law interferes with the Union's obligation to respect national identity, it should refer the case to the ECJ—the only court empowered to interpret E.U. law.

The lack of consent to abusive interpretations of the E.U.'s underlying values, together with threats to block the distribution of European funds to countries that violate the rule of law, could prove successful mechanisms for European supranational systems to limit Polish backsliding. The rule of law conditionality mechanism is undeniably the most coercive measure implemented by the E.U. since the beginning of its struggles for Polish compliance with international law. It is, however, necessary to note that even financial pressure cannot actually force Poland to change its illiberal laws. Additionally, financial penalties also have a negative side. The denial of funds penalizes not just the government, but also the people of Poland, by taking from the infrastructure and services those funds would have financed.

IV. CONCLUSION

This Essay has explored one possible way of looking at the decline of the rule of law in Poland. It highlighted the abusive approach to international law practiced by the Polish Constitutional Tribunal and suggested that such an approach may constitute an important factor in the entrenchment of illiberal rule in Poland. It noted that abusive interpretation of international law ideas enables the Polish government to legitimize its unconstitutional reforms.

This Essay has also aimed to demonstrate that it is still within the capacity of European institutions to push back against the democratic regression in Poland. Even though they were introduced late and have some drawbacks, the latest measures taken by the E.U. have already generated some positive results and have potential for future use.

⁵⁷ See *id.* ¶ 72.