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Introduction

Over approximately the past decade, a wave of democratic decline has swept across the globe. All around the world, previously stable democracies have suffered illiberal erosion, often at the hands of popularly-elected authoritarian populists.¹ A prototypical example of this trend has taken place in Hungary, a once promising post-Soviet success story that, per human rights groups, is now a democracy in name only.² The driving force behind Hungary’s decline—Prime Minister Viktor Orbán and his political party Fidesz—took power in 2010, commanding a parliamentary supermajority that allowed Orbán to promulgate a new constitution and institute a number of authoritarian reforms to entrench Fidesz’s power. Such reforms include shrinking the sphere of public discourse through media laws, purging political opponents from government agencies, and undermining the independence of courts and accountability bodies.

Arguably, the newest front in Orbán’s assault on democracy involves the promulgation of a new law establishing so-called “administrative courts,” to begin operating in 2020.³ These administrative courts will possess competency to hear critical cases related to government actions, including oversight of elections and financial matters including taxation. Rights groups and European Union institutions have expressed concerns that these courts will lack independence, stemming largely from the wide latitude that Orbán’s administration will have to appoint Fidesz-friendly judges to review government actions. This paper argues that European courts—namely, the European Union’s Court of Justice (ECJ)—should enforce a “right to an independent judiciary” against Hungary. Such a right has gained burgeoning recognition in recent ECJ cases, with the

¹ See Tom Ginsburg and Aziz Huq, *How to Save a Constitutional Democracy*, 78–90, (Chicago 2018).

² As an example, Freedom House recently downgraded its rating of Hungary from “free” to “partly free.” See Freedom House, *Freedom in the World 2019: Hungary*, archived at <https://perma.cc/A2XF-6BJ6>.

³ Set out by the Law on the Administrative Courts—T/3353.

court unequivocally reading such a right into the Treaty of the European Union (TEU) in its 2018 *Associação Sindical dos Juízes Portugueses* decision.

Part I of this paper surveys the recent political history of Hungary, providing a necessary factual context in which to understand the forthcoming establishment of the nation's new administrative courts. Next, Part II offers an overview of the structure and powers of the planned administrative courts, which—in conjunction with the factual history sketched in Part I—raises grave concerns with respect to the judicial independence of those courts. Part III argues for the necessity and potential effectiveness of European Union-led intervention in Hungary. Because the Hungarian constitutional framework renders peaceful domestic opposition to Fidesz largely toothless, impeding continued democratic decline (including operation of the administrative courts) in Hungary will likely require international pressure. As Part IV discusses, an integral part of that international effort could be an adverse finding against Hungary before European courts for violating the right to an independent judiciary advanced in the ECJ's *Associação Sindical dos Juízes Portugueses* decision. Finally, Part V responds to a handful of potential critiques of this legal approach.

I. Overview of Democratic Decline in Hungary

To illustrate why the planned administrative court system in Hungary raises judicial independence concerns, it will first be necessary to situate this new development in the recent history of democratic decline in Hungary. In the immediate aftermath of the fall of the Soviet Union and Hungary's ensuing liberation from Communist rule in 1989, Hungary appeared poised for a bright era of success as a newly-constituted democratic republic.⁴ Indeed, the nation did enjoy several years of peaceful democratic rule through the 1990s and early 2000s, but also faced

⁴ Ivan Krastev, *Eastern Europe's Illiberal Revolution: The Long Road to Democratic Decline*, 97 FOREIGN AFF. 49, 49 (2018).

difficulty stemming from a lack of institutional precedent. Many of Hungary's Eastern Bloc neighbors—such as, for instance, the Czech Republic—had established traditions of constitutional governance before the era of Soviet rule, providing useful historical frameworks to turn to when forging new governments after that rule ended.⁵ Hungary, by comparison, had no such constitutional tradition: the nation's first governing document was promulgated under the Soviets in 1949.⁶ After the fall of the Iron Curtain, the new democratic government amended but, due to failure to reach consensus regarding a new framework, did not repeal the Communist constitution.⁷ That failure generated a fateful opportunity when Fidesz seized power in 2010.

That year, Viktor Orbán was hardly a newcomer to the Hungarian political scene, having previously served as Prime Minister of a Fidesz-led government from 1998 to 2002.⁸ However, Orbán's rhetoric was certainly new—riding a populist wave of anger in the wake of the 2008 global financial crisis, Orbán lashed out against the international community in general and the European Union in particular and launched fear-mongering invectives against immigrants.⁹ When his party won a landslide victory in parliament in the 2010 elections, Orbán matched his new populist rhetoric with an aggressive slate of anti-democratic reforms. Most critically, Orbán and Fidesz seized upon Hungary's constitutional vacuum and, in 2011, promulgated a new national governing document (the so-called “Fundamental Law” of Hungary).¹⁰

⁵ See, e.g., H. Gordon Skilling, *The Czechoslovak Constitutional System: The Soviet Impact*, 67 *Pol Sci Quarterly* 198, 198–99 (1952).

⁶ *Hungary Purges Stalinism From Its Constitution*, N.Y. TIMES (Oct. 19, 1989), archived at <https://perma.cc/D7VB-UQLW>.

⁷ Ginsburg and Huq, *How to Save a Constitutional Democracy* at 69 (cited in note 1).

⁸ Zack Beauchamp, *It Happened There: How Democracy Died in Hungary*, VOX (Sept. 13, 2018), archived at <https://perma.cc/6A88-FCLT>.

⁹ *Id.*; Ginsburg and Huq, *How to Save a Constitutional Democracy* at 69–70 (cited in note 1).

¹⁰ An archived version of the 2011 Fundamental Law in English translation is available at <https://perma.cc/LJN6-UQSF>.

The Fundamental Law instituted a number of subtle but important illiberal changes to the Hungarian governing framework. For one, the new constitution served to erode the independence of critical monitoring and accountability bodies within the government.¹¹ As an example, the 2011 document removed an earlier requirement that the Hungarian Election Commission must have multi-party representation, which has effectively granted Fidesz power to gerrymander election districts.¹² Fidesz control over elections has, in turn, resulted in effective one-party control of the government. Despite winning less than 50 percent of the popular vote in each recent round of elections, Fidesz has consistently commanded a two-third majority in Parliament (which, significantly, is the bar required to promulgate constitutional amendments).¹³ Orbán's administration also fired civil servants en masse and stacked administrative agencies and other government bodies with Fidesz-aligned officials, thereby undercutting bureaucratic checks to Fidesz's actions.¹⁴

To continue, Orbán and Fidesz have aggressively wielded broad legislative power under the 2011 Fundamental Law. In particular, the constitution grants the unicameral National Assembly power to issue “cardinal acts” with sweeping policy effects and which are difficult to overturn.¹⁵ Additionally, before 2011, Hungary had an atypically low threshold for constitutional amendment (in part, responsible for Orbán's facile path to domination of the Hungarian government). The Fundamental Law maintained that amendment threshold—requiring just a two-

¹¹ Kim Lane Scheppele, *Constitutional Coups and Judicial Review: How Transnational Institutions Can Strengthen Peak Courts at Times of Crisis (With Special Reference to Hungary)*, 23 *TRANSNAT'L L. & CONTEMP. PROBS.* 51 (2014) (“Under the Fidesz constitution, each of the independent accountability offices has been restructured, which led to the replacement of the prior officeholders with Fidesz loyalists.”).

¹² *See id.*

¹³ Marc Santora, *Hungary Election Gives Orbán Big Majority, and Control of Constitution*, *N.Y. Times* (Apr. 8, 2018), archived at <https://perma.cc/D6RD-JXQQ>.

¹⁴ Beauchamp, *It Happened There* (cited in note 8).

¹⁵ *See* 2011 Fundamental Law, Art. T.

thirds vote in parliament¹⁶—and since 2011 the Fidesz supermajority has continued to promulgate additional troubling constitutional changes. For instance, amendments include new provisions codifying Fidesz’s conservative social policies, such as one recent amendment which explicitly defines marriage as between one man and one woman.¹⁷ Additionally, recent amendments have instituted regressive restrictions on political speech.¹⁸

On the note of speech restrictions, Orbán has also engaged in a sweeping program to curb the speech of his political opponents and curtail the diversity of Hungarian civil society. Crucially, Fidesz owns or indirectly controls that vast majority of media outlets in rural Hungary, which allows Orbán to continually consolidate power by inundating Fidesz’s rural power base with propagandistic news stories.¹⁹ Orbán, as noted above, engages in overtly populist rhetoric, often bemoaning immigration as Hungary’s central political concern (despite the very small share of immigrants that actually settle in the country). Fidesz-aligned news outlets often help reinforce this rhetoric with distorted anti-immigrant stories.²⁰ Corruption is also endemic in Hungary, with government contracts doled out to Orbán loyalists and Fidesz-aligned businesses.²¹ Finally, registration laws targeted at NGOs are arguably designed to have a chilling effect on the work of those advocacy organizations.²²

Lastly, and of particular relevance to this discussion, are the Fidesz government’s aggressive efforts to curtail the independence of the Hungarian judiciary. Firstly, the 2011

¹⁶ See 2011 Fundamental Law, Art. S.

¹⁷ See 2011 Fundamental Law, Art. L (amended 2013).

¹⁸ Scheppele, *Constitutional Coups and Judicial Review* at 97 (cited in note 11) (“...criticizing the Fourth Amendment for introducing a new limitation on free speech...”).

¹⁹ Freedom House, *Nations in Transit 2018: Hungary*, archived at <https://perma.cc/7HZZ-3LM9> (discussing various restrictions on independent media).

²⁰ See Beauchamp, *It Happened There* (cited in note 8).

²¹ Ivan Krastev, *Eastern Europe’s Illiberal Revolution* at 50 (cited in note 4).

²² Freedom House, *Freedom in the World 2019: Hungary* (cited in note 2).

Fundamental Law annulled all previous decisions of the Constitutional Court (Hungary's apex court), even though the Court had been established and operating since 1989, erasing a rich body of case law.²³ Subsequent amendments also removed the Constitutional Court's power to review budgets and tax laws when the national debt constitutes more than fifty percent of the gross domestic product (effectively making Fidesz fiscal policy unreviewable).²⁴ In other cases, review is limited to procedural—not substantive—grounds. Additionally, the Hungarian parliament substantially lowered the retirement age for judges (now, judges must retire at 62) and expanded the number of judicial seats (including in the Constitutional Court), creating a wide swathe of judicial openings that Fidesz stocked with loyalists.²⁵

In summation, Viktor Orbán and Fidesz have engaged in a broad-based attack on democracy in Hungary, amending the structure of government, undercutting the efficacy of accountability institutions, and shrinking the domain and influence of civil society discourse. Thus, the new administrative court system must be understood not as a one-off aberration but part of a long-running effort to entrench Fidesz power and undermine democracy.

II. Structure of the New Administrative Courts

During the process of developing this paper, I travelled to Hungary and sat down for conversations with a number of scholars, activists, and government officials. One fascinating meeting took place with András Kovás, a judge of the Hungarian Supreme Court (the so-called Kuria, a judicial body with appellate jurisdiction over routine cases but subsidiary to the Constitutional Court).²⁶ Given the authoritarian slant of the Fidesz government sketched above, I

²³ Scheppele, *Constitutional Coups and Judicial Review* at 68, 97 (cited in note 11).

²⁴ See 2011 Fundamental Law, Art. 37 (amended 2013).

²⁵ Scheppele, *Constitutional Coups and Judicial Review* at 71 (cited in note 11); Beauchamp, *It Happened There* (cited in note 8).

²⁶ Interview with András Kovás in Budapest, Hungary (Mar. 22, 2019).

expected Judge Kovás to be incredibly circumspect in his comments. To my surprise, Judge Kovás was quite forthright in his remarks about the Orbán administration, sharing candid critiques of the state of Hungarian politics but also words of hope for the nation's future. Judge Kovás's openness illustrates a critical point: Orbán's anti-democratic moves have not been accomplished through fear and force but instead through technocratic institutional change (with respect to the judiciary, chiefly, court-packing). The forthcoming administrative court system is, arguably, part and parcel with that effort.

The new administrative court system will be set up pursuant to a law passed by the Hungarian Parliament in 2018.²⁷ These courts will begin operating in 2020 and their competency will involve a number of areas of government action, including taxation and election oversight.²⁸ The appellate review process will also fall within the new administrative court system (in other words, the Kuria will not receive appeals from lower administrative courts—cases will instead be appealed to a Supreme Administrative Court).²⁹ Per the new law, moreover, the executive branch will exert substantial control over the administrative courts. In particular, the “judges of the administrative courts would be appointed by the Minister of Justice on the advice of a newly-established National Administrative Judicial Council, with the Minister having a discretion to reject the first-ranked nominee of the Council.”³⁰ Thus, should these new courts tend to render pro-Fidesz decisions, a significant check on Fidesz action will be lost. Orbán, in turn, will be well-positioned to appoint friendly judges to reach favorable decisions.

²⁷ The Law on the Administrative Courts—T/3353.

²⁸ Krisztina Than, *Hungary to Set Up Courts Overseen Directly by Government*, Reuters (Dec. 12, 2018), archived at <https://perma.cc/NT9M-WZXC>.

²⁹ *Id.*

³⁰ International Court of Justice, *Hungary: ICJ Calls for Reconsideration of the Law on the Administrative Courts* (Dec. 20, 2018), archived at <https://perma.cc/U5SZ-WWAX>.

The composition of the new administrative courts is likely to be heavily-tilted in favor of new Orbán appointees. On the note of Judge Kovás, current Kuria judges who deal with administrative cases will have the option to transfer to the new courts. However, this transfer comes at a price: these judges will lose the senior ranking gained through long careers on the bench.³¹ Additionally, the number of judges on the new courts will be significantly larger than the number of current Kuria judges who oversee administrative matters. Most judicial decisions in Hungarian courts are rendered by panels of judges (e.g. a two-thirds vote on a three-judge panel).³² As such, even if many Kuria judges move over to the administrative courts, they will be regularly outvoted by pro-Fidesz magistrates. The president of the Supreme Administrative Court will, moreover, be elected by the Fidesz-dominated National Assembly.³³

Both the International Court of Justice (ICJ) and the Council of Europe's Venice Commission (VC) have expressed concerns about the administrative courts, citing the effect of these new courts on undermining the independence of the judiciary.³⁴ The ICJ's statement specifically situates the promulgation of the new courts in Hungary's recent track record of illiberalism, citing "severe deterioration of the rule of law and human rights" under Orbán's reign.³⁵ The ICJ states, further, that, "In a context where the independence of the Hungarian judiciary is already being eroded, this role of the executive [in appointing judges] raises significant concerns regarding the independence of the new courts."³⁶ Similarly, an advisory opinion

³¹ Interview with András Kovás (cited in note 26). See also Venice Commission, *Hungary: Laws on Administrative Courts Lack Effective Checks and Balances in Government* (Mar. 15, 2019), archived at <https://perma.cc/3NS6-2KC6>.

³² *Id.*

³³ International Court of Justice, *Hungary: ICJ Calls for Reconsideration* (cited in note 30).

³⁴ The concerns laid out here were echoed by human rights lawyers in Hungary. Discussions included sit-downs with attorneys for the Hungarian Civil Liberties Union (Mar. 21, 2019) and for Transparency International Hungary (Mar. 25, 2018).

³⁵ International Court of Justice, *Hungary: ICJ Calls for Reconsideration* (cited in note 30).

³⁶ *Id.*

requested by the Hungarian government and issued by the VC concludes that the features of the forthcoming administrative courts “raise questions” about the independence of the Hungarian judiciary.³⁷ In summation, the Fidesz-crafted administrative courts will have jurisdiction to hear cases about government action and the Fidesz-dominated executive branch (through the Minister of Justice) will have substantial power to oversee appointments, so the plausible outcome of this development is loss of yet another check on Fidesz power.

III. The Necessity of International Intervention

There are many reasons to be skeptical of internal political processes in Hungary resulting in a positive, pro-democracy outcome. Specifically, without substantial international pressure (and perhaps even with it), Fidesz will likely charge ahead with its implementation of administrative courts unabated. Fidesz controls parliamentary supermajorities with minority shares of the vote. In 2014, Fidesz commanded approximately forty-five percent of the vote. In 2019, Fidesz earned about forty-nine percent of the vote.³⁸ In each case, Fidesz held a two-thirds majority in the National Assembly—sufficient to pass sweeping “cardinal acts” and even constitutional amendments.³⁹ Given this fact, Fidesz is safeguarded from electoral challenge, so long as rural voters in enough districts continue to support Fidesz. There is little reason to think Fidesz’s rural vote share will collapse, especially given domination of the media market by state-owned enterprises in that sector of the country.⁴⁰ Thus, Fidesz and Orbán have little to lose and much to gain from implementation of friendly courts, unless the international community can exert negative pressure.

³⁷ Venice Commission, *Hungary: Laws on Administrative Courts* (cited in note 31).

³⁸ Santora, *Hungary Election Gives Orbán Big Majority* (cited in note 13). Note the increasing vote share from 2014 to 2018, notwithstanding—or perhaps as a direct result of—Orbán’s authoritarian machinations.

³⁹ See 2011 Fundamental Law, Arts. T and S.

⁴⁰ See Beauchamp, *It Happened There* (cited in note 8).

One might respond, here, that international pressure will do little to deter Orbán, who has proudly clothed himself in the rhetoric of nationalism. However, there is an irony worth highlighting here: on the one hand, Orbán vociferously and frequently criticizes the European Union.⁴¹ On the other, Orbán largely depends for his success on the European Union. Hungary's economy is relatively small and weak as compared to many of its neighbors. As a result, Hungary is regularly in the top five recipients of E.U. funds, and many Fidesz/Orbán development programs are sustained through those funds.⁴² As such, despite Orbán's rhetoric, there is reason to think he might actually be susceptible to E.U. pressure, insofar as that pressure includes a credible threat to strip funds from Hungary. Although a Court of Justice opinion decision could not levy so broad a penalty on its own, a clear decision to the effect that Fidesz's actions with respect to the Hungarian courts affirmatively violates the E.U.'s foundational treaty would provide a strong voice in favor of financial sanctions.

IV. The Legal Case for Enforcing a Right to an Independent Judiciary

In February 2018, the European Court of Justice issued a groundbreaking decision—*Associação Sindical dos Juizes Portugueses*—that, for the first time, read a right to an independent judiciary into the founding Treaty of the European Union.⁴³ Despite a disparate factual background, this paper argues that the court's rationale in *Associação Sindical* would be equally applicable against Hungary's implementation of the administrative courts. In 2014, Portugal's legislature introduced measures temporarily reducing the compensation paid to the persons

⁴¹ For a representative article on Orbán's critiques of the European Union, see *Hungary's Viktor Orbán blasts 'United States of Europe'*, FINANCIAL TIMES (Mar. 15, 2019), available online at <https://www.ft.com/content/53df2f7c-4717-11e9-b168-96a37d002cd3>.

⁴² Leonid Bershidsky, *How the EU Plans to Punish Hungary and Poland*, BLOOMBERG (Jan. 28, 2019), available online at <https://www.bloomberg.com/opinion/articles/2019-01-18/how-the-eu-plans-to-punish-hungary-and-poland>.

⁴³ ECJ Judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, EU:C:2018:117.

working in public administration, including judges.⁴⁴ The Associação Sindical dos Juízes Portugueses, a union acting on behalf of Portuguese judges, brought a case challenging these austerity measures as a threat to the independence of the judiciary.⁴⁵ Ultimately, the Court of Justice rejected this argument, but the language of the decision—particularly the Court’s analysis of the text of the Treaty of the European Union and of the European Charter—provides fertile ground for future litigation.

In order to apply this decision to the Hungarian administrative courts, it will first be necessary to provide an overview of the ECJ’s analytical strategy in the case. The central provision at issue in the decision is Article 19(1) of the foundational Treaty of the Europe Union, which states in relevant part: “Member States shall provide *remedies sufficient to ensure effective legal protection* in the fields covered by Union law.”⁴⁶ Interestingly, the ECJ interpreted this language with reference to a separate European treaty—the Charter of Fundamental Rights of the European Union (“Charter”). In relevant part, Article 47 of the Charter sets forth a “right to an effective remedy” which mandates that “[e]veryone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.”⁴⁷ Thus, Article 47 of the Charter—which the court used to understand Article 19 of the TEU—sets forth a requirement of independent judicial tribunals under the umbrella of a right to effective legal remedies.

The ECJ, in turn, set forth several critical principles with respect to these important treaty provisions. As an initial matter, the Court made clear that Article 19 of the TEU gives “concrete expression to the value of the rule of law,” thereby centering effective legal remedies at the heart

⁴⁴ *Id.* at ¶¶ 9–10.

⁴⁵ *Id.* at ¶ 13.

⁴⁶ Treaty of the Europe Union, Art. 19 (emphasis added).

⁴⁷ Charter of Fundamental Rights of the European Union, Art. 47 (emphasis added).

of democratic governance.⁴⁸ In turn, the Court confirms that, under Article 19 of the TEU, member states hold an obligation to offer effective judicial remedies. As part of upholding that binding obligation, the Court further states, “maintaining a ... tribunal’s independence is essential, as confirmed by the second subparagraph of Article 47 of the Charter, which refers to the access to an ‘independent’ tribunal as one of the requirements linked to the fundamental right to an effective remedy.”⁴⁹ Furthermore, the ECJ also sketches a fairly broad definition of judicial independence. Per the Court, “The concept of independence presupposes, in particular, that the body concerned exercises its judicial functions *wholly autonomously*, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever...”⁵⁰

Arguably, this opinion represents a burgeoning recognition of a right to an independent judiciary—including attendant member state obligation—within the European Union. To my mind, the analysis excerpted above has three important functions. Firstly, the analysis frames the TEU’s requirement of “remedies sufficient to ensure effective legal protection” as a concrete implementation of the “rule of law.” In other words, failure to uphold the obligation to provide effective legal remedies is a failure to uphold the rule of law. Second, the analysis ties TEU Article 19(1) to Charter Article 47. Article 47 indicates that independent courts are a “requirement” for fulfilling the right to an effective remedy. As such, where European Union members deny their citizens independent tribunals, they are denying them a fundamental right enshrined by the Charter. Finally, the Court’s language gives a broad construction to “independence,” requiring that courts act “wholly autonomously” without any “hierarchical constraint.” In summation, taken together,

⁴⁸ *Associação Sindical dos Juizes Portugueses* at ¶ 32.

⁴⁹ *Id.* at ¶ 41.

⁵⁰ *Id.* at ¶ 47 (emphasis added).

these components of the ECJ’s analysis provide a powerful litigation tool, reading in a robust obligation for member states to provide “wholly” independent judicial tribunals under the E.U.’s founding treaty document.

In turn, one can make a strong legal argument that Hungary—should it implement the administrative court system sketched in the 2018 law—would be in violation of the rights framework sketched by the ECJ.⁵¹ Substantial executive branch oversight of the court system belies the notion that it could operate “wholly autonomously.” One might respond that, once administrative judges are seated, they will be free to exercise “independent” judgment. However, multiple impartial international organizations—including the Venice Commission and the International Court of Justice—have rejected that argument, rightly diagnosing the administrative court system as a threat to an independent judiciary. Insofar as the structural design of the court system could be said to cut against judicial independence, the analysis above makes clear that this constitutes a violation of right rights conferred to Hungarians under the Charter. Moreover, this would also constitute a violation of the “rule of law” as defined by the TEU. These grave implications—rights violations and undermining the rule of law—would in turn form a compelling case for levying E.U. sanctions against the Hungarian regime.

V. Responses to Potential Critiques of this Approach

There are, to continue, a handful of critical objections one might raise against this proposed ECJ-centric response to Hungary’s forthcoming administrative court system. This Part sketches

⁵¹ It bears noting that scholars Matteo Bonelli and Monica Claes have reached similar conclusions regarding the *Associação Sindical* and argue that it might plausibly provide the basis for an action against Poland. See Matteo Bonelli and Monica Claes, *Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary*, 14 EUROPEAN CON. L. REV. 622 (2018) (“...the Court concluded that Article 19 TEU includes an obligation to uphold judicial independence. In other words, judicial independence has now acquired a new role within the EU constitutional order as a primary law obligation.”).

and responds to three such objections. First, one might argue, a 2012 case before the ECJ regarding forced retirement of judges in Hungary illustrates that the ECJ would be unwilling to follow the rights-based analysis sketched above.⁵² Although many commentators have framed forced retirement of Hungarian judges as an attempt by Fidesz to undermine the independence of the judiciary, the ECJ did not rule on that ground. Instead, the ECJ held that forced retirement violated European Union age discrimination provisions.⁵³ To respond, I would submit that the ECJ's earlier lack of temerity should not foreclose the legal development proposed here. Notably, the ECJ recently demanded a freeze on a similar attempt in Poland to forcibly retire older judges.⁵⁴ There, the ECJ forthrightly cited judicial independence and the "rule of law" as the central concerns behind its decision.⁵⁵

Next, one might respond that it hardly matters what legal conclusions a European Union tribunal reaches; Viktor Orbán and Fidesz will readily ignore any order from the E.U. Part III, above, sketches an argument for why Orbán might be surprisingly receptive to E.U. pressure in certain domains. Namely, his rule has benefited heavily from E.U. funds and a credible threat of sanctions could prove a legitimate deterrent for the Hungarian regime. Moreover, in the Polish case cited in the preceding paragraph, Poland complied with an ECJ order regarding its judiciary—a notable development given that Poland is facing many of the same democratic erosion issues as Hungary.⁵⁶ That case might provide a useful model: perhaps the ECJ could order cessation of implementation or at least restructuring of the proposed administrative court system. Should

⁵² See Sarah Paulsworth, *EU Court Strikes Down Hungary Law Lowering Retirement Age for Judges*, JURIST (Nov. 6, 2018), archived at <https://perma.cc/ULA2-AQEY>.

⁵³ *Id.*

⁵⁴ Jan Cienski, *ECJ Confirms Freeze on Early Retirement of Polish Supreme Court Judges*, POLITICO (Dec. 17, 2018), archived at <https://perma.cc/8995-8D7C>.

⁵⁵ *Id.*

⁵⁶ *Id.*

Hungary decline to follow such a decision, other European bodies could move forward with sanctions.

Finally, one might contend that establishing the partiality of the forthcoming administrative courts might be a tall order, especially because many European nations have specialized administrative courts to review government actions.⁵⁷ This fact could give Hungary plausible, neutral cover in any action before the ECJ. On that contrary, both the text of the Administrative Court Law and the factual context of democratic erosion in Hungary rebut this contention. The former gives the executive branch—through the Minister of Justice—ability to appoint partial judges, a feature not observed in other European systems.⁵⁸ The history of democratic erosion in Hungary—sketched in Part II above—also belies an ostensibly neutral rationale. Additionally, both the ICJ and the Venice Commission have identified the proposed administrative courts as a threat to the independence of the Hungary judiciary.⁵⁹ In summation, there is ample reason to think that the forthcoming administrative court system would not live up to the robust standard sketched in *Associação Sindical*.

Conclusion

In summation, the ECJ has established a potent legal vector through which to challenge Hungary's forthcoming administrative court system. The new system is rightly understood as the next step in a decade-long illiberal project, with the recent history of Hungary demonstrating a multi-front attack on democracy perpetrated by Viktor Orbán and his Fidesz government. The

⁵⁷ For example, the German Bundesverfassungsgericht is a specialized appellate court for administrative matters. For an overview of that court's jurisdiction, see an archived page from that court's website: <https://perma.cc/5FF6-RRVK>.

⁵⁸ For comparison, judges of the Bundesverfassungsgericht are selected by a non-partisan "Committee for the Election of Judges," according to the court's website: <https://perma.cc/2ALQ-BTH4>.

⁵⁹ International Court of Justice, *Hungary: ICJ Calls for Reconsideration* (cited in note 30); Venice Commission, *Hungary: Laws on Administrative Courts* (cited in note 31).

administrative courts—to be established next year pursuant to a recent law passed by the Fidesz dominated legislature—are a notable part of that anti-democratic project, removing independent judicial checks on the Fidesz government. Moreover, as a result of the structural realities of Hungary government and society, it is likely that only external pressure can help curtail this democratic erosion. The ECJ’s refreshing decision in *Associação Sindical dos Juízes Portugueses* provides a roadmap through which the ECJ could hold Hungary to be in violation of the Treaty of the European Union and the Charter on Fundamental Rights. In turn, an adverse decision could highlight Orbán’s pernicious attacks on the rule of law and help serve as foundations for European sanctions against his regime.